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BURUNDI-ICC: TRIAL OF STRENGTH OVER BURUNDI'S DUTY TO COOPERATE WITH RESPECT TO THE SITUATION IN BURUNDI

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Abstract

Africa's hostile posture towards the International Criminal Court (ICC) with respect to its member States' duty to cooperate fully has become increasingly widespread. Except for the Hashemite Kingdom of Jordan, all ICC's findings of non-compliance with the Court's request for cooperation involve African States, namely, the Republic of South Africa, the Democratic Republic of the Congo, the Republic of Chad and the Republic of Malawi; the Court found that all these States Parties had failed to comply with their obligations under the 1998 Rome Statute to cooperate with the Court by refusing to arrest and surrender the then Sudanese President Omar Hassan Ahmad Al Bashir. As for Burundi, its officials stated that from late 2017, Burundi will not cooperate with the Court over investigations and proceedings in relation to crimes within the jurisdiction of the Court allegedly committed in the country while it was a Party to the Rome Statute.

After it had concluded the withdrawal process from the Rome Statute pursuant to Article 127 (1), which became effective on 27 October, 2017, Burundi declared that it will not cooperate with the ICC over proceedings resulting from the investigation into the crimes allegedly committed in Burundi from 26 April 2015 to 26 October 2017. The proceedings had been authorized by the Pre-Trial Chamber III on 25 October, 2017.

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Interestingly in this respect, a provision that stipulates that “No Burundian may be extradited to a foreign country” was introduced in the 2018 Burundi Constitution. This context suggests an upcoming trial of strength between Burundi and the ICC over the duty to “cooperate fully with the Court” with respect to the situation in Burundi.

This chapter debates the international legality of the Burundi’s decision not to cooperate with the International Criminal Court with respect to proceedings resulting from the investigation into the situation in Burundi. It further discusses the impact of the Burundi’s refusal to cooperate with the Court on the said proceedings. Placing the Burundi case study within the broader context of the States’ defiance of the ICC with respect to the duty to cooperate, the chapter concludes by reflecting on the impact of this defiance on the ability of the Court to fulfil its mandate to end impunity for the most serious crimes of concern to the international community as a whole.

BURUNDI-CPI : ÉPREUVE DE FORCE AU SUJET DE L'OBLIGATION DE COOPÉRATION CONCERNANT LA SITUATION AU BURUNDI

Résumé

La défiance africaine envers la Cour Pénale Internationale (CPI) en rapport avec l'obligation, à charge des États Parties au Statut de Rome de la CPI, de coopérer pleinement avec la Cour prend de plus en plus d'ampleur. A l'exception du Royaume hachémite de Jordanie, toutes les conclusions de non-coopération aux requêtes émises par la CPI concernant des pays africains, en l'occurrence la République d'Afrique du Sud, la République Démocratique du Congo, la République du Tchad et la République du Malawi. Parties tous au Statut de Rome de la CPI, la Cour a jugé que ces États avaient manqué à leurs obligations internationales en refusant de coopérer dans l'arrestation et le transfert du dorénavant ancien président soudanais Omar Hassan Ahmad Al Bashir. En ce qui concerne le Burundi, certains de ses officiels ont fait savoir depuis la fin 2017 que le Burundi ne coopérera pas avec la CPI dans les enquêtes et les procédures en rapport avec les crimes de la compétence de cette Cour prétendument commis sur le territoire de ce pays au moment où il était Partie au Statut de Rome.

A l'issue du processus de retrait du Statut de Rome conformément à l'article 127 (1), retrait devenu effectif le 27 Octobre 2017, le Burundi a déclaré qu'il ne coopérera pas avec la CPI relativement aux procédures en rapport avec les enquêtes sur les crimes prétendument commis au Burundi entre le 26 avril 2015 au 26 octobre 2017. Le commencement de ces enquêtes a été autorisé par la Chambre préliminaire III de la CPI le 25 Octobre 2017. Il est important de noter qu'une disposition introduite dans la Constitution burundaise de 2018 stipule qu'« aucun Burundais ne peut être extradé ». Ce contexte suggère une possible épreuve de force à venir entre le Burundi et la CPI au sujet de l'obligation de « coopérer pleinement avec la Cour » en relation avec la situation au Burundi.

Ce chapitre débat d'abord de la légalité internationale de la décision du Burundi de ne pas coopérer avec la CPI au sujet des procédures en relation avec les enquêtes dans le cadre de la situation au Burundi. Il discute ensuite l'effet du refus du Burundi de coopérer avec la Cour en ce qui concerne ces procédures. Plaçant le cas du Burundi dans le cadre plus large de la défiance étatique à l'égard de la CPI –en relation avec l'obligation de coopérer–, ce chapitre esquisse l'impact de cette défiance sur la capacité de la Cour à réaliser sa mission de mettre fin à l'impunité pour les crimes les plus graves qui touchent l'ensemble de la communauté internationale.

1 Introduction

Burundi signed the Rome Statute of the International Criminal Court⁶¹⁸ (ICC) on 13 January 1999 and ratified it on 30 August 2003.⁶¹⁹ The ratification instrument was deposited on 21 September 2004 with the United Nations Secretary-General (UNSG) in his capacity as Depositary of the Rome Statute.⁶²⁰ Pursuant to Article 126, paragraph 2, the Statute entered into force for Burundi on 1 December 2004. Against this background, one may note that Burundi has been a supporter of the ICC since its early days, although it did not participate in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.⁶²²

However, this support did not survive the political and humanitarian crisis that erupted in Burundi in 2015 after the incumbent President Pierre *Nkurunziza* was nominated by his ruling *Conseil National pour la Défense de la Démocratie-Forces de Défense de la Démocratie* (CNDD)⁶²³ party to run for a contested⁶²⁴ third term in

⁶¹⁸ Adopted 17 July 1998, entered into force 1 July 2002. U.N. Doc. A/CONF. 183/9* (1998), available at <http://www.un.org/law/icc/statute/romefra.htm>; *U.N.T.S.*, Vol. 2187, n° 38544.

⁶¹⁹ Law No. 1/011 of 30 August 2003, *Official Gazette of Burundi* (Bulletin Officiel du Burundi), No. 9/2003, p.629.

⁶²⁰ See article 121, 122, 125-128 read together.

⁶²¹ See C.N.936. 2004.Treaties-26.

⁶²² Held in Rome from 15 June to 17 July 1998.

⁶²³ National Council for the Defense of Democracy - Forces for the Defense of Democracy.

⁶²⁴ See, *inter alia*: Filip De Maesschalck and Sergio Gemperle, 'Pural Claims to Legitimacy: Conceptualising Legitimacy in Hybrid Political Orders' (27 August 2015), 9; Nina Wilén, Gérard Birantamije, and David

office. A crisis during and following which the Office of The Prosecutor (OTP) determined that there is a reasonable basis to believe that crimes falling within the ICC's subject-matter jurisdiction were committed.⁶²⁵

The opening, of a preliminary examination into the situation in Burundi since April 2015 by the ICC Prosecutor in April 2016 was followed by a crisis in the relationship between Burundi and the Court. In the wake of the opening of the investigation, the Government of Burundi adopted a legislative draft aiming to withdraw Burundi from the ICC, thus setting the stage for the legal withdrawal process. The process was sped up with the United Nations Human Rights Council's decision, through resolution A/HRC/33/24 of 30 September 2016, to create a Commission of Inquiry on Burundi with a one-year mandate, which tasks would include "a *thorough investigation into human rights violations and abuses in Burundi since April 2015, including on their extent and whether they may constitute international crimes, with a view to contributing to the fight against impunity*"; as well as the identification of "alleged perpetrators of human rights violations and abuses in Burundi with a view to ensuring full accountability".

The withdrawal took effect on 27 October 2017 in accordance with Article 127(1) of the Rome Statute.⁶²⁶ Until the day on which the Burundi's

Ambrosetti, 'The Burundian Army's Trajectory to Professionalization and Depoliticization, and Back Again', *Journal of Eastern African Studies* 12, no. 1 (2 January 2018): 120–35, <https://doi.org/10.1080/17531055.2017.1418173>; Denis M. Tull and Claudia Simons, 'The Institutionalisation of Power Revisited: Presidential Term Limits in Africa', *Africa Spectrum* 52, no. 2 (4 August 2017): 79–102; Tim Sweijs et al., *The Many Faces of Political Violence* (The Hague Centre for Strategic Studies, 2017), 19.

⁶²⁵ ICC (Office of the Prosecutor), Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a preliminary examination into the situation in Burundi. See <https://www.icc-cpi.int/pages/item.aspx?name=otp-stat-25-04-2016&ln=kirundi&ln=fr> [last accessed on 09.04.2018]. The OTP reported that "from 26 April 2015 onwards, members of the Government, the Burundian security forces and the *Imbonerakure* committed at a minimum the following acts constituting crimes against humanity: murder under article 7(1)(a); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence of comparable gravity under article 7(1)(g); enforced disappearance under article 7(1)(i); and persecution against any identifiable group or collectivity on political grounds under article 7(1)(h)."

⁶²⁶ This provision reads as follows: "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

withdrawal from the ICC took effect, there was no decision issued by the Court and *made public* authorizing the commencement of an investigation into crimes allegedly committed on the Burundi's territory or by Burundians. To celebrate what senior officials in the government apparatus hailed as a great victory for Burundi⁶²⁷ against a Court that "has shown itself to be a political instrument and weapon used by the West to enslave"⁶²⁸ other States, officials called upon people to demonstrate across the country. On 28 October 2018, one day after the withdrawal became effective and in response to the call by officials, thousands of Burundians took the streets cheering the effectiveness of the withdrawal with banners stamped and chanting the slogan "bye ICC". At the same time, human rights activists were mourning what was seen as a major blow to international justice.⁶²⁹

A strong turn of events that sounded as thunder in the clear sky over Bujumbura occurred on 9 November 2017. Unexpectedly, Burundi and the rest of the world alike heard that the ICC had authorized an investigation regarding the Burundi situation. Although it was made public on 7 November 2017, the decision was first issued under seal on 25 October 2017, while Burundi was still a State-Party to the Rome Statute. At the Prosecutor's request, the ICC's Pre-Trial Chamber III granted, under Article 18 of the Statute as held in paragraph 19, a delay of ten working days in notifying Burundi.

The announcement of the authorization by the ICC to commence an investigation into the Situation in Burundi was followed by Burundi officials' statements strongly dismissing the ICC's decision as illegal and fraudulent. In a tweet posted on 25 October 2017, Willy Nyamitwe, the Senior Advisor in charge of Media, Information and Communication to Burundi's President Pierre Nkurunziza, went so far as to say that the ICC had issued "a backdated decision".⁶³⁰ The Court's decision was issued on the

date."

⁶²⁷ See *inter alia* 'Burundian officials celebrate withdrawal from ICC', *Xinhua*, October 28, 2018; 'Burundi becomes first nation to leave international criminal court', *The Guardian*, 28 October 2017. <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court> [last accessed 10.04.2018]

⁶²⁸ *The Guardian*, 'Burundi becomes first nation to leave international criminal court', 28 October 2017. <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court> [last accessed 10.04.2018]

⁶²⁹ *Suhr E. V.*, 'Reflections on Burundi's exit from the International Criminal Court' *Georgetown Journal of International Law* available at <http://www.gjil.org/2018/02/reflections-on-burundis-exit-from.html>

⁶³⁰ Gladstone and Marlise Simons, 'We're Not Done Yet, Hague Court Tells Burundi's Leaders', *The New York Times*, November 17, 2017. available at: <https://www.nytimes.com/2017/11/09/world/africa/icc-burundi->

basis of materials implicating several members of State institutions⁶³¹ as well as members of the youth wing of the ruling CNDD-FDD party, known as the *Imbonerakure*,⁶³² in the commission of alleged crimes falling within the ICC's jurisdiction. Since the announcement of the Court's decision, Burundi vowed to never cooperate with the Court. In the meanwhile, the ICC ruled that "subsequent to the entry into force of its withdrawal, Burundi's obligation to cooperate with the Court in relation to [the authorized investigation] remains in effect for as long as the investigation lasts and encompasses any proceedings resulting from the investigation".⁶³³ As one may easily notice, Burundi and the ICC have opposite views on the Burundi's duty to cooperate with the Court in relation to the abovementioned investigation.

2 The ICC's Investigation into the situation in the Republic of Burundi: The legal status of Burundi under the Rome Statute

This section seeks to understand the status of Burundi *vis-à-vis* the Rome Statute of the ICC in relation to investigation into the situation in this country, whose commencement was authorized on 25 October 2017 by Pre-Trial Chamber III. Since the scope of states' rights and obligations resulting from treaties vary depending on the status of these States with respect to each treaty, the determination of the status of Burundi with respect to the Rome Statute is interesting in order to determine whether or not under the Statute Burundi has obligation to cooperate with the ICC in relation to the investigation into the situation in Burundi of which the Court authorized the commencement; and if there is any, to determine its scope.

Vis-à-vis a treaty, the 1969 Vienna Convention on the Law of Treaties (VCLT)⁶³⁴ distinguishes three different status of States, namely that of "Contracting States", "States Parties" and "Third Parties." The VCLT gives the meaning of each of the three expressions. For the purposes of the said Convention, "'Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force" (Article 2.1(f)); "'Party" means a State which has consented to be bound by

nkurunziza.html [last accessed 09.04.2018]: Uwimana, D., 'ICC authorizes investigation into Burundi', *Iwacu*, November 9, 2017: available at: <http://www.iwacu-burundi.org/englishnews/icc-authorizes-investigation-into-burundi/> [last accessed on 09.04.2018].

⁶³¹ Namely the National Intelligence Services, the Police.

⁶³² Literally "those who see far" in Kirundi, language common to all Burundian.

⁶³³ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, ICC-01/17-X-9-US-Exp, 25 October 2017, para.26.

⁶³⁴ 1155 *U.N.T.S.* 331, 8 *I.L.M.* 679, entered into force January 27, 1980.

the treaty and for which the treaty is in force (Article 2.1(g)) and “Third State” means a State not a party to the treaty (Article 2.1(h)). The Rome Statute and the doctrine add another category, namely the category of “Withdrawing States”.

Though frequently used in legal literature, the expression “withdrawing State” is not defined by those who use it. A close review of the literature that use the concept “withdrawing state” shows that authors refer to a State in the process of denouncing or withdrawing from a treaty or that concluded this process. The notification in writing⁶³⁵ of the State’s claim to withdraw from a treaty to the other parties is the decisive act within the withdrawal process regarding the qualification of a State as “withdrawing”⁶³⁶. Since the 27 October 2016, when the UNSG was notified by Burundi of its withdrawal from the Rome Statute of the International Criminal Court⁶³⁷, Burundi became a withdrawing State. This finding leads to another important issue: the legal duty of Burundi as a withdrawing State from the Rome Statute and in connection with criminal proceedings resulting from the investigation into the situation in the Republic of Burundi. This issue will be discussed in the section below.

3 Legal duties of Burundi as a Withdrawing State

As far as withdrawing states are concerned, distinction must be made between two different hypotheses. The first hypothesis concerns withdrawing States before the withdrawal takes effect but only after they have addressed a withdrawal written notification to UNSG in accordance to Article 127 paragraph 1 of the Rome Statute. The second hypothesis is that of withdrawing States, after the withdrawal takes effect. Depending on the period of which midnight of the 26th of October 2017 is the frontier, Burundi may fall within the first or the second hypothesis. Of the two hypotheses, the latter is more interesting with respect to the debate on the legal duties of withdrawing

⁶³⁵ In the section dealing with “*Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty*”, Article 67.1 of the VCLT specifies that “The notification provided for under article 65, paragraph 1 must be made in writing” (See note below). For the specific case of the Rome Statute of the ICC, article 127 (1) reads as follows: ““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.”

⁶³⁶ Article 65.1 of the VCLT on “*procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty*” provides that “A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim”.

⁶³⁷ C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification)

States. The first hypothesis does not raise difficulties as regards to the issue of legal duties of withdrawing States. With respect to these duties, the situation of the withdrawing State does not differ from that of non-withdrawing States Parties. In reality, during the withdrawal process until the withdrawal takes effect, generally upon expiry of a certain period of time set out in the treaty subject to withdrawal or not less than twelve months if the treaty does not provide for any period of time⁶³⁸, after the date of its receipt by the depositary or the Contracting State, the withdrawing State remains, and rightly, bound to all obligations of a State Party. This was the case for Burundi from October 27, 2016 to October 26, 2017 regarding the Rome Statute of the ICC. Until the date on which the withdrawal takes effect, exiting State's obligations continue. Interpreting article 127(1) of the Rome Statute of ICC, the Court held that "a withdrawing State remains, for all intents and purposes, a State Party in the period between the communication of the notification of withdrawal and the end of the ensuing one-year interval."⁶³⁹ This finding is consistent with Article 70(1)(a) of the VCLT which provides that only "the termination of a treaty under its provisions or in accordance with the [Vienna] Convention (...) releases the parties from any obligation further to perform the treaty."

Regarding the second hypothesis, namely that of a State Party after the withdrawal takes effect, one can note that its situation is similar to that of a State that has never been party to the treaty, the Third State under Article 2.1 (h) of the 1969 Vienna Convention on the Law of Treaties. Today, for situations that may arise after its withdrawal has taken effect, namely after the 26 of October 2017, Burundi's obligations *vis-à-vis* the ICC are that of any non-State Party to the Rome Statute.

After the ICC's Pre-Trial Chamber III authorized on 25 October 2017 the commencement of an investigation into crimes allegedly committed on the Burundi's territory or by Burundians over the period starting from 1 December 2004⁶⁴⁰ up to and including 26 October 2017,⁶⁴¹ Burundi's officials declared that Burundi will not cooperate with the ICC over proceedings resulting from that investigation.⁶⁴² Significantly, a

⁶³⁸ See article 56, paragraph 2 of the Vienna Convention on the Law of Treaties of 23 May 1969, *U.N.T.S.*, Vol. 1155,1-18232, p.331.

⁶³⁹ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, para. 24.

⁶⁴⁰ Date of entry into force of the Rome Statute of the ICC for Burundi.

⁶⁴¹ Date on which Burundi's withdrawal from the Rome Statute of the ICC took effect.

⁶⁴² The Burundi's Minister of Justice, *Aimé-Laurentine Kanyana*, has made it clear: "*Burundi will never cooperate with ICC*" (Uwimana, D., 'Burundi will never cooperate with ICC, says Justice Minister', *Iwacu*, Bujumbura, November 10, 2017. available at: <http://www.iwacu-burundi.org/englishnews/burundi-will->

provision of the 2018 Burundi Constitution, states that “No Burundian may be extradited to a foreign country”.⁶⁴³ On the contrary, the Constitution of 18 March 2005 provided for the extradition of a national “*in case he is subject to criminal proceedings by an international court for genocide, war crime or other crimes against humanity*”. Still, one may argue that the aforementioned provision of the 2018 Constitution does not explicitly bar the extradition of Burundians in cases where they are subject to criminal proceedings by an international court.

However, both the context in which the 2018 was drafted, adopted and promulgated and the Burundian officials’ hostile discourse toward the ICC⁶⁴⁴ as well as the context of the Constitution itself,⁶⁴⁵ suggest the contrary. Both contexts suggest an upcoming trial of strength between Burundi and the ICC over the duty to “cooperate fully with the Court” with respect to the situation in Burundi. Even by assuming that the change in the Constitution to the extradition regime proceeds from a deliberate strategy of “guarantees of impunity”,⁶⁴⁶ we contend that this change would have no legal effect on Burundi’s obligations under the Rome Statute of the ICC, as Article 27 of the VCLT, which reflects a general customary international rule,⁶⁴⁷ provides that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

never-cooperate-with-icc-says-justice-minister/ [last accessed 27 November 2017]).

⁶⁴³ Article 50 *in fine*.

⁶⁴⁴ See Niyonkuru, A.-P., ‘Burundi-CPI: Les non-dits et la vraie-fausse stratégie d’un retrait’, HJ van der Merwe and Gerhard Kemp(eds), *International Criminal Justice in Africa*, 2017, Nairobi, Strathmore University Press/KAS, 2018, p. 73-105.

⁶⁴⁵ In a brochure endorsed by the Government of Burundi with the title «Comprendre le nouveau projet de constitution révisée: Principales innovations», the author provides a definition of extradition whose scope extends beyond the letter of Article 50 of the Burundian Constitution (See note no.). In this brochure, extradition is defined as “the fact of transferring a Burundian who is subject to criminal proceedings by a foreign or an international Court” (Original in French reads as follow: «L’extradition est le fait de transférer un burundais poursuivi pour un crime pour qu’il soit jugé par une juridiction étrangère ou internationale»). The author of the brochure elaborated his explanation: “The Constitution of March 2005 authorized extradition by specifying that a Burundian may be extradited in cases he is subject to criminal proceedings by an international court for genocide, war crime or other crimes against humanity (article 50). The current [draft] forbids extradition and reaffirms accordingly the competence of Burundians courts over its (*sic*) Citizens” (Original in French reads as follows : « La constitution de mars 2005 autorisait l’extradition en spécifiant qu’un burundais pouvait être extradé s’il était poursuivi par une juridiction pénale internationale pour crime de génocide, crime de guerre ou autres crimes contre l’humanité (Article 50). L’actuel projet de Constitution interdit l’extradition et réaffirme par conséquent la compétence des juridictions burundaises de juger ses citoyens »).

⁶⁴⁶ Bernard Ntahiraja, ‘L’ interdiction absolue d’extrader les nationaux dans la Constitution burundaise du 7 juin 2018 : une lecture (essentiellement) juridique’ (5 July 2018), <https://www.uantwerpen.be/images/uantwerpen/container49545/files/burundi%202018/presentations/ntahiraja%20bernard%20iob%20burundi%20conference%202018.pdf>.

⁶⁴⁷ *European Molecular Biology Laboratory Arbitration*, Arbitration Tribunal, Award of 29 June 1990, ILR, Vol. 105, p. 25; *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgement of 4 June, ICJ Report 2008, p. 41, para. 124.

This rule is without prejudice to article 46.” Both the Permanent Court of International Justice (PCIJ) and its successor the International Court of Justice (ICJ) held that “it is a generally accepted principle of international law that in the relations between Powers who are Contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty”.⁶⁴⁸ In the same breath, in *European Molecular Biology Laboratory Arbitration* (EMBL v Germany), the Arbitration Tribunal asserted that under Article 27 of the Vienna Convention, “a party to a treaty cannot invoke its internal law in order to justify the non-fulfillment of the treaty”.⁶⁴⁹

When Burundian officials vowed not to cooperate with the ICC, there then arises the question of whether such a claim does rest on a certain legal basis. We first dismiss the assumption that Burundi could publicly and proudly proclaim its disavowal of international law. Obviously, a State that is accused of breaching its international obligations or that is found to have failed to comply with its obligations under international law will have a natural inclination to argue the compliance of its actions or/and omissions with international law. As far as the duty to cooperate with the ICC is concerned, none of the States Parties and non-Parties to the Rome Statute that were found by the Court to have failed to comply with their obligations under Article 87(7) of the Rome Statute acknowledged the wrongfulness of its conduct.

This said, whilst Burundi senior officials repeatedly warned that Burundi would refuse to cooperate with the Court, they did not provide a strong legal ground for their claim. This makes it difficult to discuss the legality of Burundi’s decision under international law. Two senior officials have been particularly vocal in arguing that Burundi will not collaborate with the ICC probe, namely, the Minister of Justice and Civic Protection, Aimée-Laurentine Kanyana and the Senior Advisor in charge of Media, Information and Communication to Burundi’s President Pierre Nkurunziza, Ambassador Willy Nyamitwe. In an interview with *Agence France Presse* on 11 November 2017 in the aftermath of the publication of ICC Pre-Trial-Chamber III’s *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, Aimée-Laurentine Kanyana declared that “Burundi rejects

⁶⁴⁸ *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration*, signed at Neuilly-sur-Seine on November 27th, 1919 (Question of the “Communities”), PCIJ, Series B, No.17 (1930), p.31; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988, p.35.

⁶⁴⁹ *European Molecular Biology Laboratory Arbitration*, p.25.

this decision from the very outset”,⁶⁵⁰ a decision she said “was not communicated (...) [to] Burundi before its effective departure”.⁶⁵¹ Suggesting that the decision “was taken in violation of the Rome Statute and the principles of international law,”⁶⁵² the Minister declared that Burundi “is not bound by this decision”⁶⁵³ and that “in any case, Burundi will never begin cooperation with the ICC for implementing [such] a decision”.⁶⁵⁴ In a tweet he posted on 25 October 2017, Willy Nyamitwe, for his part, declared that the ICC’s decision appears to be “nothing else but a backdated decision”.⁶⁵⁵ This grave and unprecedented accusation was not echoed by other state officials, as is generally the case with hostile rhetoric against the ICC that lacks minimal supporting evidence.⁶⁵⁶

As one may notice from the sample discourse above, while Burundi displays its determination to defy the ICC by refusing to cooperate with it, the discourse lacks elaborate and/or sophisticated legal argument. First, Minister Kanyana’s allegation that the ICC’s decision was taken in violation of the Rome Statute and the principles of international law lacks precision regarding the provision of the Rome Statute and the principle(s) of international law that the ICC’s purportedly decision does not comply with. Secondly, the Minister’s allegation that the ICC’s decision was not communicated to Burundi before its effective departure lacks legal merit. It is true that, while authorisation to investigate was issued by ICC Pre-Trial Chamber III on 25 October 2017, it was only made public on 9 November 2017, 14 days after Burundi’s withdrawal from the Rome Statute became effective. The procedure was conducted under seal, *ex parte*,⁶⁵⁷ and the decision issued under Article 15(4) of the Statute with the same level of classification, namely, under seal, *ex parte* and only available to the Prosecutor. The

⁶⁵⁰ AFP, ‘Burundi says it will “never” collaborate with ICC probe’, Nairobi, *Daily Nation*, 11 November 2017. Available at <https://www.nation.co.ke/news/africa/Burundi-declines-to-cooperate-with-ICC/1066-4182172-i7fwcrz/index.html> (Accessed on 3 October 2018).

⁶⁵¹ *Id.*

⁶⁵² *Id.*

⁶⁵³ *Id.*

⁶⁵⁴ *Id.* See also, *mutatis mutandis*, Uwimana, D., ‘Burundi will never cooperate with ICC, says Justice Minister’, *Iwacu*, Bujumbura, November 10, 2017. available at: <http://www.iwacu-burundi.org/englishnews/burundi-will-never-cooperate-with-icc-says-justice-minister/> [last accessed 27 November 2017].

⁶⁵⁵ Gladstone and Marliese Simons, ‘We’re Not Done Yet, Hague Court Tells Burundi’s Leaders’, *The New York Times*, November 17, 2017. available at: <https://www.nytimes.com/2017/11/09/world/africa/icc-burundi-nkurunziza.html> [last accessed 09.04.2018]; Uwimana, D., ‘ICC Authorizes Investigation into Burundi’, *Iwacu*, November 9, 2017: available at: <http://www.iwacu-burundi.org/englishnews/icc-authorizes-investigation-into-burundi/> [last accessed on 09.04.2018].

⁶⁵⁶ Niyonkuru, A.-P.

⁶⁵⁷ See Regulation 23 *bis* of the Court “Filing of documents marked *ex parte*, under seal or confidential”, Adopted by the judges of the Court on 26 May 2004 Fifth Plenary Session, The Hague, 17- 28 May 2004, *Official documents of the International Criminal Court*, ICC-BD/01-01-04.

delayed notification was not arbitrary, since it was authorized by the Court under Article 18(1) of the Statute.⁶⁵⁸ In support of this special procedure, the Court held:

“In view of the continued risks facing the victims and potential witnesses [REDACTED] as well as the complete lack of international cooperation on the part of the Burundian authorities, the Chamber considers that the Prosecutor must be allowed a limited period of time for the sole purpose of preparing and implementing protective measures for victims and (potential) witnesses, if authorization to commence an investigation is granted. Accordingly, a fair balance between articles 18(1) and 68(1) of the Statute requires that, for the purposes of the particular situation in Burundi, the Prosecutor’s request for a delay of ten working days in notifying a potential decision authorizing an investigation to the States concerned be granted.”⁶⁵⁹

In short, it emerges from the above analysis that the main legal argument put forward by Burundi in order to justify its announced refusal to cooperate with the ICC consists of arguing that - since it is no longer member of the Court - it has no duty to cooperate with the Court in relation to the aforementioned investigation. Such a view lacks legal merit and is inconsistent with the ICC’s decision of 25 October 2017 as well as with the state of international law concerning treaties. It is true that since its withdrawal was effective on 27 October 2017, Burundi is no longer an ICC member state and that, based on the *res inter alios acta* argument, it is not obliged to cooperate with the Court from that date, except in case of situations referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations and pursuant Article 13(b) of the Rome Statute. However, for obligations incurred or accrued while Burundi was a Party to the Rome Statute, including that the performance of which extend beyond the effective date of withdrawal, this paper contends that such obligations are not affected by the withdrawal. The duty to cooperate in connection with criminal investigations and proceedings into the situation in Burundi is nothing else but an implementation of Burundi’s past obligations under the Rome Statute.

⁶⁵⁸ “Article 18 (1) provides that: “1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States”.

⁶⁵⁹ para. 15.

4 Burundi's Withdrawal from the Rome Statute does not affect the fulfillment of its past obligations under the Statute

Burundi's withdrawal from the Rome Statute took effect on 27 October 2017. In the understanding of Burundi (through the communications and utterances of its officials), the withdrawal from the Rome Statute terminated Burundi's legal obligations under that treaty. We do not share this view, and neither is it supported by the Rome Statute's provisions, international jurisprudence nor legal literature. An analysis of both the Rome Statute and the relevant provisions of the VCLT as well as an analysis of the legal literature lead us to argue that the Burundi's withdrawal from the Rome Statute did not affect the country's obligation to cooperate fully with the ICC with respect to proceedings resulting from the investigation into the situation in Burundi, since this obligation incurred before the country's withdrawal from the Rome Statute took effect.

Unlike treaties that do not contain denunciation or withdrawal clauses, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Second Optional Protocol to the ICCPR, the Rome Statute of the ICC does not preclude State Parties from withdrawing from the Statute. Article 127(1) of the Rome Statute allows States Parties to withdraw from it, by written notification addressed to the UNSG. This provision is permissive, as it does not condition exit upon either the consent of other States Parties or the review by international tribunals or treaty review bodies. However, such withdrawal does not affect obligations which have arisen prior to the date the withdrawal took effect. Article 127(2) of the Rome Statute reads as follows:

“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.”

The above provision refers to past obligations of a withdrawing State. The first sentence of the second paragraph captures the principle enshrined in Article 70(1)(b) of the Vienna Convention on the Law of Treaties, according to which past obligations survive withdrawal from the treaty regime.⁶⁶⁰ The second sentence deals with an example of this principle, namely, cooperation in connection with investigations and prosecution. The last part of the second sentence “nor shall it prejudice” makes it clear by the words “any matter which was already under consideration by the Court” that a State of which nationals have been put under the jurisdiction of the Court by a State referral or by a Prosecutor acting *proprio motu* cannot terminate such proceedings by withdrawing from the Statute. Thus, when a State finds it, or its leaders targeted by investigations or prosecution, the Rome Statute seeks to prevent the use of state withdrawal as a means of avoiding its jurisdiction. The relevance of Article 70(1)(b) of the VCLT is of such significance with respect to the interpretation of Article 127(2) of the Rome Statute that the Court itself explicitly referred to this provision in its decision of 25 October 2017.⁶⁶¹ In this decision the Court emphasizes that before the withdrawal takes effect, “a withdrawing State remains, for all intents and purposes, a State Party”.⁶⁶² The Court further drew the scope of Burundi’s duty to cooperate in the following terms:

“In the view of the Chamber, any obligations on the part of Burundi arising out of the Chamber’s article 15(4) decision would survive Burundi’s withdrawal. The reason is that the present decision is delivered prior to the entry into effect of Burundi’s withdrawal on 27 October 2017. Accordingly, it cannot be disputed that, if authorized, an investigation into the situation in Burundi would commence prior to the date on which the withdrawal became effective. Therefore, subsequent to the entry into force of its withdrawal, Burundi’s obligation to cooperate with the Court in relation to such an investigation, if authorized, remains in effect for as long as the investigation lasts and encompasses any proceedings resulting from the investigation.”

⁶⁶⁰ This provision reads as follows: “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, the termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.”

⁶⁶¹ The Court held the following: “On the whole, article 127(2) of the Statute gives effect to the principle contained in article 70(1)(b) of the Vienna Convention on the Law of Treaties, which provides that the termination of a treaty “[d]oes not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination” (para. 25).

⁶⁶² *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, para. 24.

Interestingly, for continued crimes whose first commission goes back to the time when Burundi was still a State Party to the Rome Statute, the Court further extended Burundi's duty to cooperate beyond the date upon which the withdrawal took effect. On this extension, Pre-trial Chamber III held: "(...) in the light of the continuous nature of certain crimes, the Prosecutor may also extend her investigation to crimes even if they continue after 26 October 2017".⁶⁶³ This view is shared by Professor Charles C. Jalloh, who on the Kenya case remarks that "even if the ICC Prosecutor were to decide to commence additional cases before the date that the one-year withdrawal becomes effective, those proceedings would also entail a continued duty for Kenya to cooperate with the court".⁶⁶⁴

The ICC's finding on the withdrawing States Parties' obligation to cooperate with respect to past obligations is in harmony with both international jurisprudence and the dominant scholarly literature. An analysis of the international case law confirms that the withdrawal from a treaty has no effect either on pending proceedings or jurisdiction already established by a Court. Hence, on Peru's withdrawal of its recognition of the contentious jurisdiction of the Inter-American Court of Human Rights, the Inter-American Court on Human Rights, citing thereon the Inter-American Commission on Human Rights stated that "unilateral action by a State cannot divest an international court of jurisdiction it has already asserted".⁶⁶⁵ In the case concerning *Right of Passage over Indian Territory*, the International Court of Justice held that:

"It is a rule of law generally accepted as well as one acted upon in the past by the Court that, once the Court has been validly seized of a dispute, unilateral action by the respondent State in terminating its declaration in whole or in part cannot divest the Court of jurisdiction."⁶⁶⁶

In this case, the Court explicitly made reference to the *Nottebohm* case where it was held that "An extrinsic fact (...) cannot deprive the Court of the jurisdiction already

⁶⁶³ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, para. 192.

⁶⁶⁴ C. Jalloh, 'Kenya Should Reconsider Proposed Withdrawal From The ICC' (*EJIL: Talk*, 18 September 2013). available at: <http://www.ejiltalk.org/kenya-should-reconsider-proposed-withdrawal-from-the-icc/> (accessed on 4 October 2018).

⁶⁶⁵ *Case of the Constitutional Court v Peru*, Aguirre Roca and Others v Peru, Competence, IACHR Series C no 55, [1999], 24th September 1999, Inter-American Court of Human Rights [IACtHR], para.24.

⁶⁶⁶ Judgment of 26 November 1957 (preliminary objection), *Case Concerning Right of Passage Over Indian Territory (Portugal v. India)* [1957] ICJ Reports 125, 142.

established”.⁶⁶⁷

In the legal literature, many specialists of international law are of the view that the withdrawal from the Rome Statute by a State shall have neither the effect of terminating proceedings which were commenced prior to the date on which the withdrawal took effect, nor that of releasing the said State from its duty to perform any other obligation which has arisen before the date at which the withdrawal became effective and hence the date at which the Statute entered into force for that State. For Roger Clark, the purpose of Article 127(2) of the Rome Statute is to ensure that a state whose nationals have been subject to a referral to the Prosecutor by another state or by the Prosecutor acting *proprio motu* is not able to terminate such proceedings by withdrawing.⁶⁶⁸ In a paper where he critically comments on Kenya’s proposed withdrawal from the ICC, Professor Jalloh writes the following:

“First, it is true that under Article 127(1) of the Rome Statute, a State Party may, by notifying the UN Secretary-General, who is the depository of treaties, “withdraw” from the statute. So, although I hope that this does not happen, Kenya has the sovereign right to withdraw because of the consensual nature of international law. However, the withdrawal would take effect no earlier than one year after the date of receipt of the notification. More fundamentally, for our purposes, withdrawal cannot be used to undermine the ICC’s ongoing investigations and prosecutions. Thus, a withdrawing state is not “discharged, by reason of its withdrawal, from the obligations arising from” the statute during the time it was a party.”⁶⁶⁹

Although it is demonstrated that with respect to the investigation and proceedings in relation with a situation in the Republic of Burundi, this country has an obligation to cooperate fully with the ICC under the Rome Statute, the risk of a non-cooperation stance may not be underestimated. This hypothesis raises the question of the impact of such a stance on the ICC’s ability to exercise its jurisdiction, both with respect to the Burundi situation and in general.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ Clark, R. S. ‘Article 127 – Withdrawal’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by article*, Second edition, C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2008, p. 1777-1778.

⁶⁶⁹ C. Jalloh, see note 49.

5 Impact of Burundi's refusal to Cooperate with the ICC on ability of the Court to execute its Mandate

*As I shall illustrate, the effectiveness of both the judicial arm and the investigation arm of an international criminal tribunal depends heavily on state cooperation and is ultimately impeded by lack of state cooperation under the guise of state sovereignty.*⁶⁷⁰ - Antonio Cassese

This section suggests two main consequences of Burundi's non-compliance with requests of the ICC for cooperation, contrary to the provisions of the Rome Statute. First, it argues that such non-compliance would render extremely difficult the exercise by the Court of its jurisdiction with respect to the situation in Burundi as referred to above and that the Court has no means at its disposal to force Burundi to cooperate with it. Second, and relatedly, the section argues that the Court's lack of enforcement powers over its own decisions constitutes a serious threat to its viability. In this respect, the paper suggests a review of the Rome Statute to adopt robust and compelling sanctions against States that fail to comply with ICC's requests for cooperation as the only means to ensure the State cooperation and to enable the Court to effectively execute its mandate under the Rome Statute.

Obviously, a fair and effective investigation into the situation in Burundi and subsequent proceedings require a good-faith cooperation from Burundi as well as from other States Parties to the Rome Statute. The Court may also seek voluntary cooperation of States not Parties to the Statute as well as from non-state entities.⁶⁷¹ In short, the Court must rely on the cooperation of states to effectively investigate and prosecute cases. Antonio Cassese's argument on the International Criminal Tribunal for the former Yugoslavia (ICTY) *a fortiori* applies to the ICC. He argues that an international criminal tribunal

“... relies primarily on the cooperation of national authorities for the effective investigation and prosecution of persons accused of [violations of international humanitarian law]. Accordingly, all requests for assistance or

⁶⁷⁰ Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law*, (1998) 2-17, p. 12.

⁶⁷¹ ICC, Pre-Trial Chamber III, ICC-01/17-X-9-US-Exp, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, October 25, 2017, para. 15.

orders of the ICTY, for instance, are addressed to and processed by the national system of the relevant state as the first resort. Cooperation is necessary in relation to requests for assistance or orders of the ICTY for the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of the accused to the ICTY. States are obliged to cooperate with the ICTY for these purposes pursuant to Article 29 of the ICTY Statute. In relation to requests for assistance or orders of the ICTY for the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of the accused to the ICTY.”⁶⁷²

Cassese’s remarks highlight the importance of state cooperation – particularly within the territory wherein crimes are alleged to have been committed – to the success of international criminal justice. Regarding specifically the ICC, the Assembly of States Parties (ASP), the ICC’s legislative and management body, has repeatedly “stress[ed] the importance of effective and comprehensive cooperation and assistance by States Parties, other States, and international and regional organizations, to enable the Court to fulfill its mandate as set out in the Rome Statute.”⁶⁷³ However, as experience over the recent past has shown, there is an increase in instances of non-cooperation by both ICC States Parties and non-member states. The defiance of the ICC, mostly by AU Member States,⁶⁷⁴ likely predicts more of the same to come.

This paper therefore puts forward the highly plausible hypothesis of Burundi putting its threat into action and refusing to cooperate with the ICC. Unless there is a radical change in Burundi’s position, its officials have made it clear that Burundi will

⁶⁷² Antonio Cassese, p. 12.

⁶⁷³ “Report of the Bureau on cooperation” (ICC-ASP/15/18), Annex I, Draft resolution on cooperation, 10 November 2016; Resolution ICC-ASP/14/Res.3, “Resolution on cooperation”, Adopted at the 12th plenary meeting, on 26 November 2015, by consensus; Resolution ICC-ASP/13/Res.5, Strengthening the International Criminal Court and the Assembly of States Parties, Adopted at the 13th plenary meeting, on 17 December 2014, by consensus; Resolution ICC-ASP/12/Res.3, “Resolution on cooperation”, Adopted at the 12th plenary meeting, on 27 November 2013, by consensus; Resolution ICC-ASP/10/Res.2, “Resolution on cooperation”, Adopted at the 7th plenary meeting, on 20 December 2011, by consensus; Declaration on cooperation RC/Decl.2 Adopted at the 9th plenary meeting, on 8 June 2010, by consensus at the Kampala Review Conference; Resolution ICC-ASP/7/Res.3, “Resolution on cooperation”, Adopted at the 7th plenary meeting, on 21 November 2008, by consensus.

⁶⁷⁴ Humphrey Sipalla, ‘State Defiance, Treaty Withdrawals and the Resurgence of African Sovereign Equality Claims: Historicising the 2016 AU-ICC Collective Withdrawal Strategy’, HJ van der Merwe, Gerhard Kemp (eds), *International Criminal Justice in Africa, 2016*, Nairobi, Strathmore University Press/KAS, 2017, p.61-99.

not under any circumstances cooperate with the ICC.⁶⁷⁵ Burundi's threat should be seriously considered since alleged perpetrators of crimes in question are members of its defense and security forces, its intelligence services and the *Imbonerakure*.⁶⁷⁶ The ICC has already experienced uncooperative responses to its requests for cooperation and formal findings of non-compliance having been made against both States Parties and non-Parties to the Rome Statute.⁶⁷⁷ If it occurs, Burundi's non-cooperation would simply add to the growing list of States in breach of their duty to cooperate with the Court under the Rome Statute.

At a certain stage during investigation and proceedings, the Court will have to transmit to Burundi a request for cooperation. Predictably, unless there occurs a spectacular turn of events, Burundi will not comply with such a request. The recent changes in the extradition regime in the 2018 Constitution to preclude the extradition of nationals (see above) and the anti-ICC rhetoric of President Nkurunziza's administration augur Burundi's failure to comply with the ICC's request for cooperation. The absence of domestic legislation to permit cooperation with the ICC is also more likely to support the assumption that Burundi will not cooperate, at least in the short term. However, from a medium to long-term perspective, since the ongoing crisis in the relationship between

⁶⁷⁵ See above note

⁶⁷⁶ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*. See also: Human Rights Council, *Detailed Final Report of the Commission of Inquiry on Burundi* (A/HRC/39/63), 12 September 2018 (only in French), available at: <https://www.ohchr.org/en/hrbodies/hrc/coiburundi/pages/coiburundi.aspx> (accessed on 5 October 2018); Human Rights Council, *Report of the Commission of Inquiry on Burundi* (A/HRC/36/54), 11 August 2017, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/237/46/PDF/G1723746.pdf?OpenElement> (accessed on 5 October 2018); Human Rights Watch, *World Report 2015*, Events of 2016, available at: <https://www.hrw.org/world-report/2017/country-chapters/burundi> (accessed on 5 October 2018).

⁶⁷⁷ *Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir*, No. ICC-02/05-01/09, 11 December 2017; *Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute*; No.: ICC-02/05-01/09, 11 July 2016; *Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute*, No.: ICC-02/05-01/09, 11 July 2016; *Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan*, No. ICC-02/05-01/09, 9 March 2015; *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, ICC-02/05-01/09-195, 9 April 2014; *Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09, 26 March 2013; *Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-140, 13 December 2011; *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139, 12 December 2011.

Burundi and the ICC has a political explanation, it is naturally also precarious. A regime change, a significant shift in political power or in political ideology is more likely to recreate a healthy relationship between Burundi and the ICC, thus allowing the country's cooperation with the Court. At this point, the example of the Republic of The Gambia may serve as a good example.

The Gambia gave notice of its withdrawal from the Rome Statute on 10 November 2016⁶⁷⁸ and withdrew it on 10 February 2017⁶⁷⁹ after President *Yahya Jammeh* was forced out of office by the ECOWAS Standby Force for refusing to accept the result of the 2016 election. The Court harbours no illusions. Securing the State cooperation may take time. In the Case of *The Prosecutor v. Uhuru Muigai Kenyatta*, the Court held that

“... where a requested State did not immediately comply with a cooperation request, it may not amount to statutory non-compliance, if, through consultation and negotiation with the requesting entity, the requested State materially complied with the request within a reasonable timeframe. In this regard, the Chamber reiterates its view that cooperation is a continuing process and that both the requesting entity and the requested State should make genuine efforts to resolve any difficulties in order to facilitate the execution of a request.”⁶⁸⁰

And by assuming that despite consultation and negotiation, Burundi fails to comply with the request of the Court for cooperation “within a reasonable timeframe” and that consequently, it is found in breach of its obligation under the Rome Statute to cooperate pursuant to article 87(7), such a finding would not, of course, affect its continued duty to perform the obligation it has breached.⁶⁸¹ Accordingly, since in international law there is no time limit for the prosecution of [war crimes and] crimes

⁶⁷⁸ UN Depository Notification, Gambia: Withdrawal, C.N.862.2016.TREATIES-XVIII.10, 10 November 2016.

⁶⁷⁹ UN Depository Notification. Gambia: Withdrawal of Notification: C.N.62. 2017.TREATIES-XVIII.

⁶⁸⁰ *Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*, No. ICC-01/09-02/11 1/46, 3 December 2014, para. 40 in fine.

⁶⁸¹ This in accordance with Article 29 of the Draft articles on Responsibility of States for Internationally Wrongful Acts (2001). This article provides that the State responsibility for an internationally wrongful act does not affect the continued duty of the responsible State to perform the obligation breached.

against humanity⁶⁸² and that prescription of such crimes does not apply in Burundi,⁶⁸³ a cooperation secured after a formal finding of non-compliance by the Court may still be useful to deal with the Court's investigation and proceedings. However, the process of securing State cooperation cannot last forever. Otherwise, this would violate standards for fair trial and the interest of good administration of justice. In the case *Prosecutor v Uhuru Muigai Kenyatta*, the ICC denied the Prosecution's request to adjourn the case until the Kenyan Government complies with the revised request for records.⁶⁸⁴ The Court considered that it was not appropriate for the proceedings to be further prolonged under the circumstances specific to the case. Only for complex cases, "an adjournment of limited duration, and for a clearly defined purpose which the Chamber considers necessary in the interests of justice" may be justified.⁶⁸⁵

On the other hand, the ICC's investigation and prosecution of crimes in relation to the situation in Burundi, though challenging, remain possible even in the case of a Burundi's failure to comply with the ICC's requests for cooperation. With an effective and comprehensive cooperation and assistance by States Parties and non-party States alike, as well as by international and regional organizations, the Court may be able to exercise its jurisdiction though it would obviously be much less effective in discharging its mandate than it could be in a scenario wherein the court is able to rely on some cooperation from Burundi. If, as a matter of principle, ICC investigation and prosecution could not be successful without the cooperation of the territorial state, the Court would have terminated the proceedings against *Omar Hassan Ahmad Al Bashir* since the Court found that the Republic of Sudan has failed both to cooperate with it under Article 87(7) of the Rome Statute and to consult the Court in accordance with Article 97 of the Statute and Rule 195(1) of the Rules of Procedure and Evidence.⁶⁸⁶ This suggests that notwithstanding the significance of the investigative challenges cases where the Court fails to secure the cooperation of the host State, the prosecution of crimes that fall within the ICC's jurisdiction remains possible, provided that the cooperation other States – both

⁶⁸² Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968. Entry into force: 11 November 1970, in accordance with article VIII, 754 *U.N.T.S.* 73.

⁶⁸³ *Law no.1/27 of 29 December 2017 revising the Criminal Code*, Article 152.

⁶⁸⁴ *Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*, No. ICC-01/09-02/11 1/46, 3 December 2014, para. 83.

⁶⁸⁵ *Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date*, No. ICC-01/09-02/11 1/47, 31 March 2014, para. 97.

⁶⁸⁶ *Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan*, No. ICC-02/05-01/09, 9 March 2015.

ICC member and non-member states – and international and regional organizations is secured. Article 54(3)(c) of the Rome Statute empowers the Prosecutor to “[s]eek the cooperation of any State”, while under Article 89(1)

“The Court may transmit a request for the arrest and surrender of a person, (...) to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”

Through its Resolution ICC-ASP/14/Res.3 of 26 November 2015, the ASP stressed

“the importance of effective and comprehensive cooperation and assistance by States Parties, other States, and international and regional organizations, to enable the Court to fulfill its mandate as set out in the Rome Statute and that States Parties have a general obligation to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction, including with regard to the execution of arrest warrants and surrender requests, as well as other forms of cooperation set out in article 93 of the Rome Statute.”

Of course, without Burundi’s cooperation, the risk that the Court may encounter considerable difficulties in investigating crimes within its jurisdiction allegedly committed in Burundi or by Burundians prior to the date the withdrawal took effect is great. Not only may the Court’s investigating agents be denied access to Burundian territory (as were the members of the United Nations Commission of Inquiry on Burundi⁶⁸⁷), but also one may fear that victims and witnesses of those crimes could face intimidation arising from their cooperation with the ICC. While the risk of intimidation of, and interference with witnesses is significant for those located in Burundi, it is comparatively lower among those in exile.⁶⁸⁸ Burundian refugees and diaspora include

⁶⁸⁷ The Commission was created by Human Rights Council resolution 33/24, adopted on 30 September 2016, to conduct a thorough investigation into human rights violations and abuses in Burundi since April 2015, to determine whether any of them may constitute international crimes, to identify their alleged perpetrators and to formulate recommendations for ensuring that such perpetrators “are held accountable for their acts”. By its resolution 36/19, adopted on 29 September 2017, the Council extended the Commission’s mandate without modification for one year.

⁶⁸⁸ Since the start of the 2015 crisis, sources report that some 420,000 Burundians have fled to neighbouring

many victims and witnesses of human rights violations, some of which amount to crimes against humanity.⁶⁸⁹ Although the Commissioners were refused access to the territory of Burundi, they however fulfilled their mandate, conducting more than 400 interviews with victims, witnesses other sources; this in addition to the 500 interviews conducted and the testimonies gathered during its initial mandate period.⁶⁹⁰

The assumption of non-cooperation raises the question of its legal consequences. Under Article 87(7) of the Rome Statute

“Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”

For the case under investigation, the UN Security Council did not refer the matter to the ICC. Rather, the Prosecutor used her *proprio motu* powers to initiate an investigation. Therefore, assuming that, either of its own accord or at the Prosecution’s request, the Court makes a finding of non-compliance pursuant to Article 87(7) and at its discretion,⁶⁹¹ refers the matter to the ASP, the question is by what means this ICC’s “guardian angel”⁶⁹² could ensure that Burundi cooperates fully with the Court. Article 112(2)(f) of the Rome Statute provides that “the Assembly shall consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation.” Since its 3rd Session (in 2004/2005), the ASP has adopted several resolutions on “Strengthening the

countries (See UNHCR, ‘Burundi Situation 2017: Supplementary Appeal January- December 2017 (May 2017), Burundian refugees and asylum seekers in neighbouring countries as of 30 April 2017, May 2017, <http://www.unhcr.org/59244aa77.pdf> [last accessed 6 October 2017].

⁶⁸⁹ See note above, no. 61.

⁶⁹⁰ Commission of Inquiry on Burundi, note No. 61 above.

⁶⁹¹ *Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir*, No. ICC-02/05-01/09, 11 December 2017, para. 52; *The Prosecutor v. Uhuru Muigai Kenyatta*, “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’”, ICC-01/09-02/11-1032, 19 August 2015, para.52; See also: W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Second Edition, Oxford Commentaries on International Law (Oxford, New York: Oxford University Press, 2016), 1278.

⁶⁹² C. Jalloh, see note No. 49 and 54.

International Criminal Court and the Assembly of States Parties⁶⁹³ and cooperation⁶⁹⁴ as well as reports on cooperation⁶⁹⁵ and non-cooperation.⁶⁹⁶ And a Declaration on Cooperation was adopted on 21 December 2011, at its 9th plenary meeting, the ASP adopted procedures relating to non-cooperation.⁶⁹⁷ These procedures consist of a set of measures that the ASP can take in situations where States fail to comply with their obligations to cooperate with the Court. However, the truth is that the ASP lacks enforcement powers over both its own decisions and on that of the Court. The increase in cases of non-compliance with requests from the ICC for cooperation (mainly relating to arrest warrants and orders for surrender of persons) may be explained by the fact that the ASP is not empowered in the Statute with specific sanctioning powers. International lawyers have pointed out the weakness of the ICC's cooperation regime. Hence, while Annika Jones argues that "The most severe response that the Court can take to instances of non-cooperation is a judicial finding of non-cooperation and diplomatic pressure through its legislative and management body, the ASP",⁶⁹⁸ **Göran Sluiter observes that the Statute's silence on the measures to impose on a state in breach of its obligation to cooperate calls into question the effectiveness of the Assembly's responses to violations of the duty to cooperate.**⁶⁹⁹ Accordingly, he argues in favour of a more robust role for the ASP.⁷⁰⁰

As far as the hypothesis on a possible request by the ICC Prosecutor for a finding of non-compliance against Burundi is concerned, another legal question is likely to

⁶⁹³ ICC-ASP/3/Res.3, 10 September 2004; ICC-ASP/4/Res.4, 3 December 2005; ICC-ASP/5/Res.3, 1 December 2006; ICC-ASP/6/Res.2, 14 December 2007; ICC-ASP/7/Res.3, 21 November 2008; ICC-ASP/8/Res.3, 26 November 2009; ICC-ASP/9/Res.3, 10 December 2010; ICC-ASP/10/Res.5, 21 December 2011; ICC-ASP/11/Res.8, 21 November 2012; ICC-ASP/12/Res.8, 27 November 2013; ICC-ASP/13/Res.5, 17 December 2014; ICC-ASP/14/Res.4, 26 November 2015; ICC-ASP/15/Res.5, 26 November 2016.

⁶⁹⁴ ICC-ASP/8/Res.2, 26 November 2009; ICC-ASP/10/Res.2, 20 December 2011; ICC-ASP/11/Res.5, 21 November 2012; ICC-ASP/12/Res.3, 27 November 2013; ICC-ASP/13/Res.3, 17 December 2014; ICC-ASP/14/Res.3, 26 November 2015; ICC-ASP/15/Res.3, 26 November 2016.

⁶⁹⁵ ICC-ASP/6/21, 19 October 2007; ICC-ASP/18/44, 15 November 2009; ICC-ASP/12/34, 7 November 2013; ICC-ASP/13/40, 5 December 2014; ICC-ASP 04/14, 14 November 2017.

⁶⁹⁶ ICC-ASP/11/29, 1 November 2012; ICC-ASP/12/34, 7 November 2013; ICC-ASP/13/40, 5 December 2014; ICC-ASP/14/38, 18 November 2015; ICC-ASP/15/31, 8 November 2016; ICC-ASP/15/31/Add1, 9 November 2016; ICC-ASP/16/16, 26 October 2017; ICC-ASP/16/17, 22 November 2017.

⁶⁹⁷ Annexed to Resolution ICC-ASP/10/Res.5, *Strengthening the International Criminal Court and the Assembly of States Parties*, Adopted at the 9th plenary meeting, on 21 December 2011, by consensus.

⁶⁹⁸ Jones, Annika (2016) 'Non-cooperation and the efficiency of the International Criminal Court.', Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: perspectives from theory and practice*, Leiden: Brill, p.187-185-209. Nottingham studies on human rights. (4).

⁶⁹⁹ Goran Sluiter, 'The Surrender of War Criminals to the International Criminal Court', 25 *The Loyola of Los Angeles International and Comparative Law Review*, (2003), p. 616.

⁷⁰⁰ Göran Sluiter, 'Enforcing Cooperation: Did the Drafters Approach It the Wrong Way?', 16 *Journal of International Criminal Justice*, 2 (2018) 383-402.

arise. Since Article 87(7) refers to “a State Party” failing to comply with a request to cooperate by the Court contrary to the provisions of this Statute, the question is whether this provision is applicable to Burundi which will not be longer a “State Party” to the Rome Statute when the Prosecutor will eventually file the request and when the Court will issue its decision on the said request. In our opinion, this provision should be interpreted in light of the above-discussed principle of past obligations, considering that the Prosecutor’s request should be viewed as an appendix of, or connected to pending proceedings in respect of which the ICC’s jurisdiction is already established.⁷⁰¹

6 Conclusion

Some international scholars have portrayed the ICC as a “paper tiger” or a “giant without legs” due to its ineffective enforcement mechanisms, while the cooperation regime appears as the Achilles heel of the Court’s procedural framework. This paper focused on the issue of cooperation with respect to a withdrawing State. Using Burundi as a case study and relying on the Rome Statute, the Vienna Convention and the theory of past obligations as both legal and theoretical materials, it has argued that with respect to proceedings resulting from the investigation into the crimes allegedly committed in Burundi from 26 April 2015 to 26 October 2017, the period during which Burundi was still a State Party to the Rome Statute of the ICC, Burundi’s claim that its withdrawal from the Statute on 27 October 2017 discharges it from the obligation to cooperate fully with the Court over the aforementioned proceedings or from any other obligation arising from this Statute while it was a Party to the Statute lacks legal merit. Accordingly, under the Rome Statute, the Court is entitled to make requests to Burundi for cooperation, and the latter has the obligation to cooperate fully with the Court. If all efforts to secure Burundi’s cooperation should fail, the Court will probably make a finding of non-compliance against Burundi and refer the matter to the Assembly of States Parties. However, since the Rome Statute remains silent in regard to the repercussions of a member state that refuses to comply with the ICC’s requests for cooperation, the paper argued the ineffectiveness of the ASP’s responses to state non-compliance. The case of Sudan’s President *Al Bashir* is a particularly poignant illustration of this ineffectiveness. Despite warrants for arrest issued against him, he has been traversing the globe, including multiple visits to states party to the Rome Statute. Although the Court made findings of non-cooperation under

⁷⁰¹ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, ICC-01/17-X-9-US-Exp, 25 October 2017.

article 87(7) and referred the matter to the United Nations Security Council, there is nothing to show that such referrals have resulted in an incentive for states to cooperate with the Court. To the contrary, the Court continues to face increasing challenges to secure cooperation, especially when, like in the *Bashir* case, the stakes are high.

Regarding the impact of Burundi's non-cooperation, the paper argued that the lack of cooperation of the territorial State will have an obvious and negative impact on the ability of the Court to conduct fair and effective investigations and/or prosecutions. Assuming that most of the suspects and individuals under warrant by the ICC will carefully avoid countries where there is a risk of being arrested and surrendered, the Court could hardly properly exercise its jurisdiction when it lacks enforcement mechanisms to ensure defendants' appearance at trial (the Rome Statute does not provide for trials in *absentia*). More dramatically, by lengthening the list of countries having "successfully" defied the Court over the duty to cooperate under the Rome Statute, Burundi's non-cooperation will show once more how ineffective the Rome Statute system is when faced with uncooperative States, both members and non-members. This paper linked this weakness to a lacuna in the Rome Statute with regards to repercussions for States in breach of their obligation to cooperate. As a result, the paper concludes that both the viability of the ICC and its ability to achieve its goal of putting an end to impunity for the perpetrators of international core crimes depends upon the strengthening the ICC's cooperation regime. At present, the ICC's cooperation regime lacks compelling sanctions and penalties for state non-compliance.

In this respect, a review of the Rome Statute to adopt persuasive and compelling sanctions in response to non-cooperation instances seems the right way to ensure effective state cooperation. This suggestion is, however, far from easily attainable. The chance of securing the two-third majority of States Parties required to adopt a necessary amendment of the Rome Statute is low. Particularly in a time when the legitimacy, the independence and the impartiality of the Court is contested. Moreover, possible sanctions like the suspension from the rights and privileges of membership and expulsion are far from being persuasive when the mere threat by State members of withdrawing from the Court places significant pressure on both the Court and its members. As for privileges membership, if they exist and perceived by the State members as such, the fact is that such alleged privileges may be of a less importance compared to expected benefits of a withdrawal. Admittedly, sanctions like trade sanctions, financial sanctions or military

intervention are among the most persuasive. However, these sanctions emerge as irrelevant against a State failing to cooperate under the Rome Statute. Considering, for instance, the non-cooperation as a threat to the international peace and security under the UN justifying collective enforcement action, is an example of such persuasive sanctions. But once again, the benefit-cost of the insertion of such a sanction is such States are less likely to adopt such a norm. Comparatively, amendments of the Rome Statute to criminalize active non-cooperation in the Rome Statute –as complement or a replacement of other enforcement mechanisms may constitute credible alternatives⁷⁰²

⁷⁰² See further Bernard Ntahiraja's chapter in this volume.