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Press Release by the Embassy of Burundi in The Hague on the authorisation to open an investigation regarding the situation in Burundi by the Prosecutor of the International Criminal Court

The Embassy of the Republic of Burundi in The Hague expresses its profound dissatisfaction and regret, following the information it received through media sources, that the judges of the International Criminal Court ("ICC"), issued a decision authorising the ICC Prosecutor to open an investigation regarding crimes within the jurisdiction of the Court allegedly committed in Burundi.

On 9 November 2017, three Pre-Trial Chamber judges of the ICC issued a public version of their decision whereby they alleged that crimes within the jurisdiction of the Court were allegedly committed by high-ranking Burundi State agents and other groups implementing State policies, including members of national intelligence services, and members of the youth wing of the ruling party, known as the *Imbonerakure*, while Burundi was a State party to the ICC Rome Statute.

The Decision of the three panel judges of the ICC authorized the ICC Prosecutor to extend her investigation to *any crime* within the jurisdiction committed before 26 April 2015, when the ruling party of Burundi nominated President Pierre Nkurunziz as its candidate in the 2015 presidential elections, and after 26 October 2017, when the withdrawal of Burundi from the ICC became effective.

Burundi has experienced sporadic acts of violence, both internally and through external influence, since April 2015 when President Nkurunziz was nominated as a candidate for elections. On 27 October 2016, Burundi provided notification of its intention to withdraw. It had become apparent to Burundi that rather than being an independent and impartial judicial institution, the ICC had become more of a politicised instrument and weapon, used by stronger countries, to coerce weaker countries into doing what they deemed fit for their own individual interests.

As a sovereign country recognised under international law, Burundi had exercised its right to join the ICC from 1 December 2004. Burundi similarly exercised its right as a sovereign country to withdraw from the ICC on 27 October 2016. According to the relevant texts of the ICC, this withdrawal took effect after 26 October 2017.

Almost 2 weeks after Burundi's withdrawal from the ICC had taken effect, on 9 November 2017, the ICC issued its public decision authorising its Prosecutor to initiate an investigation



in the situation of Burundi, for any potential crimes under the ICC relevant texts, as well as any potential crimes taking place after the withdrawal of Burundi took place.

The Embassy of the Republic of Burundi in The Hague deeply regrets this ICC decision in as much as it is dissatisfied with its content for several reasons.

The drafting of the Rome Statute, the ICC's founding instrument, was done in accordance with several rules and principles under international law, most of these rules and principles have been codified in the Vienna Convention on the Law of Treaties.

Among some of these principles under international law or the laws of international organisations, are the requirements that parties to a treaty, as well as the treaties themselves, be interpreted in good faith, that a treaty can neither create rights nor obligations for a State without its consent.

Within the context of the ICC, although the judges and Court have been given the power and competence to interpret the Rome Statute, this power is not unlimited, as the ICC is still an organ created under international law by States, among which Burundi used to be a party.

In this regard, the Embassy of Burundi in The Hague has noted some issues of concern, which in its view, indicate the ICC has acted *ultra vires*.

For a Court created under the fundamental notion of complementarity and primacy given to national jurisdictions, it is of concern that, although the Court acknowledged efforts made in Burundi in regard to conducting national investigations as well as prosecutions resulting from the April 2015 unrest, these were nevertheless found to be insufficient for several reasons, among which were the fact that they allegedly were not elaborate enough or lacked forensic examinations for instance.

The Embassy of the Republic of Burundi in The Hague was made aware of the ICC's authorisation to investigate in Burundi through media sources on 9 November 2017.

The ICC's authorisation Decision notes that ***"Article 18(1) of the Statute provides in the relevant part that, "[w]hen [...] 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 words "shall notify" signify the Prosecutor's duty to proceed with such a notification."***

The Decision proceeds to stating that *"Nevertheless, the Chamber is also mindful of article 68(1) of the Statute, which provides in the relevant part that "[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses". As discussed, this duty applies at the preliminary examination stage as well. Accordingly, when deciding on the Prosecutor's request, the Chamber is required to balance the Prosecutor's duty to inform States as soon as a Pre-Trial Chamber has authorized the commencement of an investigation with the duty, incumbent upon the Court as a whole, to protect victims and witnesses."*

In regard to the above, the determination that the duty for the Court to protect the well-being of victims and witnesses applies at the preliminary examination stage 'as well' is a position difficult to reconcile with the discussions during the *travaux préparatoires* of the Rome Statute, as such, this is a consideration taken by the Court acting *ultra vires*. The



reference or consideration made by the Court regarding Article 68, binds the Court in terms of its duties towards the victims and witnesses within the context of **criminal proceedings** and not of (pre)investigations. Indeed the Court noted that the Prosecutor is not prevented from seeking for the protection of victims and witnesses at preliminary stages, however, such a duty, if any even existed, is only bound to the Prosecution and not a consideration for the Chamber to take disproportionately outside the bounds of a criminal proceeding.

In concluding with regard to Burundi's right as a State under Article 18 of the Statute to be notified of an investigation, the Court decided that a *"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. [...] that this exceptional and limited delay in the notification to be provided under article 18(1) of the Statute does not in any way diminish the rights accorded to States under article 18(1) and (2) of the Statute and rules 52 to 54 of the Rules to ensure that their primary jurisdiction is respected, which is the main purpose of article 18 of the Statute."*

It is unclear how the legal effect of a State's right under Article 18 could be circumvented so easily. This is another instance whereby the Court acted *ultra vires*. Article 16 of the Statute for example, which provides for an indication of circumstances in which proceedings or investigations may be delayed/ deferred, grants these powers to the UNSC under Chapter VII of the UN Charter. It is inconceivable, that the Court should unilaterally defer or restrict the rights and entitlements of States under the Statute. Regardless of the considerations taken, a delay of 10 days diminishes the rights accorded to States under Article 18 as stated in the Decision. The Court could have opted, were it really in the interest of victims and witnesses as alleged, and under 18(1), to provide Burundi with limited information at the time the authorization was granted, supposedly on 25 October 2017. The Court's authorisation was supposedly granted a day before Burundi withdrew legally from the ICC. However, the Court disregarded Burundi's right under Article 18 during the relevant time period, and Burundi was only notified of the authorisation to investigate, in violation of its sovereignty, almost 2 weeks after the withdrawal took effect, through the media.

For an institution as the ICC that relies on State cooperation, the precedence set with the Burundi situation is very disturbing. Moreover, the allegation in its Decision regarding the alleged *"complete lack of international cooperation on the part of the Burundian authorities"* is a clear indication that the Court is not acting impartially, if it is willing to go as far as further tarnishing Burundi's international image. During preliminary examination, Burundi provided information on the basis of which the Chamber made findings of measures taken by Burundi to investigate and prosecute. For the Chamber to make such a strong statement at this point in time regarding Burundi's cooperation is a clear sign of bias, political tampering and lack of impartiality.

In reference to Article 127 which deals with cooperation following withdrawal, the Decision notes that *"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"."*

It is untenable for the Court to expect to violate Burundi's rights under Article 18 while simultaneously expecting it to uphold any obligations under Article 127, more specifically



and particularly, when Burundi is only made aware of such alleged obligations **AFTER** its termination took legal effect. The Decision authorizing the investigation was supposedly issued on 25 October 2017. The only notification Burundi received was that through the media on 9 November 2017. Article 18 was unjustifiably violated.

The Decision lacks legal backing, and in content it is motivated by political considerations. Moreover, it will subvert ongoing peace, reconciliation and justice efforts deployed by the UN Security Council, the AU and the East Africa Community. While the Government of the Republic of Burundi remains guided by the principles and core values that founded the ICC, including the rule of law and the fight against impunity, it also remains determined to exercise its rights as a sovereign country.

In view of the forgoing, the Embassy of Burundi in The Hague seizes this opportunity to inform the public at large that Burundi will not cooperate with the ICC in this investigation.

Done in The Hague, 10 November 2017

Vestine NAHIMANA



Ambassador