



Questions and Answers on the decision to open an investigation regarding Burundi

1. WHAT DID PRE-TRIAL CHAMBER III DECIDE REGARDING BURUNDI?

On 25 October 2017, Pre-Trial Chamber III of the International Criminal Court (“ICC” or “Court”) authorised the ICC Prosecutor to open an investigation regarding crimes allegedly committed in Burundi or by nationals of Burundi outside Burundi. The decision was, exceptionally, issued under seal, that is to say confidentially, and only accessible to the ICC Prosecutor, since on the basis of available documentation the past and present circumstances in Burundi and neighbouring countries establish that there is a danger to the life and well-being of victims and potential witnesses. A redacted version of this decision was made public on 9 November 2017.

The Pre-Trial Chamber found that the Court has jurisdiction over crimes allegedly committed while Burundi was a State party to the ICC Rome Statute. By ratifying the Statute, a State Party accepts the jurisdiction of the Court over crimes committed either by its nationals or on its territory starting from the moment the Statute enters into force for that State and running up to at least one year after a withdrawal instrument is deposited. This acceptance of the jurisdiction of the Court remains unaffected by a withdrawal of the State Party from the Statute. As a consequence, the exercise of the Court’s jurisdiction, namely the investigation and prosecution of crimes committed up to and including 26 October 2017, is possible even after the withdrawal became effective for Burundi.

Pre-Trial Chamber III considered that the supporting material presented by the ICC Prosecutor offers a reasonable basis to proceed with an investigation, noting that according to available information there is a reasonable basis to believe:

- that crimes under the ICC jurisdiction have allegedly been committed, such as murder and attempted murder, imprisonment or severe deprivation of liberty, torture, rape, enforced disappearance and persecution as crimes against humanity;
- that according to the available information, despite the establishment of three commissions of inquiry and proceedings before domestic courts, the Burundian authorities have remained inactive in relation to potential cases arising out of the situation in Burundi. The reason was either because (i) the domestic proceedings did not concern the same persons that are likely to be the focus of an investigation into the situation in Burundi or they did not concern the same crimes as identified by the Chamber, or (ii) national investigations were deficient. In other words, there is no conflict of jurisdiction between the Court and Burundi. The Chamber also noted that the potential cases are of sufficient gravity;
- that an investigation would be in the interests of justice and of victims.

The Chamber noted that, according to estimates, at least 1,200 persons were allegedly killed, thousands illegally detained, thousands reportedly tortured, and hundreds disappeared. The alleged acts of violence reportedly resulted in the displacement of 413,490 persons between April 2015 and May 2017.

Pre-Trial Chamber III is composed of Judges Chang-ho Chung (Republic of Korea), Presiding Judge, Antoine Kesia-Mbe Mindua (Democratic Republic of Congo) and Raul C. Pangalangan (Philippine).

2. DOES BURUNDI HAVE AN OBLIGATION TO COOPERATE WITH THE ICC AFTER ITS WITHDRAWAL TOOK EFFECT ON 27 OCTOBER 2017?

Yes, the Pre-Trial Chamber’s decision was issued on 25 October 2017, prior to the date on which Burundi’s withdrawal became effective (27 October 2017). Thus, according to article 127 of the Rome Statute which specifically governs States withdrawal from the treaty, Burundi has a duty to cooperate with the Court for the purpose of the criminal investigation which commenced before 27 October 2017.

In the view of the Chamber, any obligations on the part of Burundi arising out of the decision authorising the opening of the investigation would survive Burundi’s withdrawal. The obligation to cooperate remains in effect for as long

as the investigation lasts and encompasses any proceedings resulting from the investigation. Burundi accepted those obligations when ratifying the Rome Statute.

In case of non-cooperation, the Court may make a finding to that effect and inform the Assembly of States Parties of it for the Assembly to take any measure it deems appropriate.

3. CAN BURUNDI CHALLENGE THIS DECISION?

Even though Burundi which would normally exercise jurisdiction over the alleged crimes did not enjoy any participatory rights during the authorisation process, it is possible for Burundi to ask the ICC Prosecutor to defer the investigation. According to article 18 of the Rome Statute, Burundi may inform the ICC Prosecutor, within one month after having been notified of the initiation of the investigation, that it is itself investigating or has investigated its nationals with respect to the criminal acts which may qualify as crimes within the jurisdiction of the Court and which relate to the information provided in the notification by the ICC Prosecutor. At the request of Burundi, the Prosecutor shall defer to Burundi's investigation. Should the ICC Prosecutor disagree with such a request presented by Burundi, she would be under the obligation to re-apply to the Pre-Trial Chamber for authorisation of the investigation. Burundi or the Prosecutor may appeal the subsequent decision of the Pre-Trial Chamber before the ICC Appeals Chamber.

4. WHY WAS THE CHAMBER'S DECISION INITIALLY UNDER SEAL AND WHY WAS ITS NOTIFICATION DELAYED?

On 5 September 2017, the Chamber received the Prosecutor's request for authorization of the investigation under seal, only available to the Prosecutor. The Chamber accepted, exceptionally and after ordering the Prosecutor to provide additional information, to conduct the authorisation proceedings under seal and only with the participation of the Prosecutor in order to attenuate risks to the life and well-being of victims and potential witnesses.

The Chamber considered that multiple sources indicated that the incumbent Government of Burundi has interfered with, intimidated, or harmed victims and potential witnesses. It noted further that the Government of Burundi had suspended international cooperation in connection with the alleged crimes and has denied access to the members of the United Nations Independent Investigation in Burundi. The Chamber concluded that, on the basis of the available documentation, there is a danger to the life or well-being of victims and potential witnesses and that the integrity of the ICC investigation may be compromised.

The Chamber also clarified that State(s), which would normally exercise jurisdiction over the alleged crimes, do not enjoy any participatory rights during the authorisation process.

In addition, mindful of the continued risks facing the victims and potential witnesses in Burundi and neighbouring States as well as the lack of international cooperation on the part of the Burundian authorities, the Prosecutor was allowed to delay the notification of the initiation of the investigation to States normally exercising jurisdiction over the alleged crimes for a period of 10 working days after the issuance of the authorisation decision. This limited delay was granted exceptionally and for the sole purpose of allowing the ICC Prosecutor and the Court's Registry to prepare and implement protective measures for victims and potential witnesses to mitigate potential risks within the period of 10 working days.

5. DID THE CHAMBER TAKE THE VICTIMS' VIEWS INTO ACCOUNT IN ITS EVALUATION?

Yes. Despite the fact that the Chamber could not receive victims' representations, the Chamber was guided by the views expressed by the victims in the communications sent to and submitted by the Prosecutor, in particular communications received from civil society organisations and legal representatives of victims. These communications had been received by the Prosecutor during the preliminary examination phase. The victims overwhelmingly speak in favour of opening an investigation and provide many details about the alleged crimes.

The Chamber ordered the ICC Registry to notify its decision, once public, to the victims, or to associations representing victims, who have communicated with the Court in relation to the situation in Burundi.

6. WHAT ARE THE CRIMES THAT MAY FALL WITHIN THE SCOPE OF THIS INVESTIGATION?

The Chamber found a reasonable basis to believe that State agents and groups implementing State policies, including the Burundian National Police, the national intelligence service, and units of the Burundian army, operating largely through parallel chains of command, together with members of the youth wing of the ruling party, known as the "Imbonerakure", launched a widespread and systematic attack against the Burundian civilian population. The attack targeted those who opposed or were perceived to oppose the ruling party after the announcement, in April 2015, that President Pierre Nkurunziza was going to run for a third term in office.

The Chamber found a reasonable basis to believe that Burundian State agents and members of the Imbonerakure committed, at least, the following crimes against humanity:

MURDER AND ATTEMPTED MURDER

According to estimates, no less than 1,200 individuals were killed between April 2015 and June 2017. The main perpetrators of these killings are reported to be the Burundian security forces, as well as members of the Imbonerakure. The crimes were mostly committed in Bujumbura, but also in other provinces and even outside of Burundi. The existence of at least nine mass graves was reported in 2016.

IMPRISONMENT OR SEVERE DEPRIVATION OF LIBERTY

Thousands of persons have allegedly been arrested and detained in violation of fundamental rules of international law by police and intelligence officers, often assisted by members of the Imbonerakure.

TORTURE

In the period between April 2015 and April 2016, between 595 and 651 cases of torture were documented taking place in particular in the detention centres of the intelligence services, the police, and unofficial places of detention. Acts of torture appear to have continued also into 2017.

RAPE

Dozens of cases of sexual violence committed by police officers, military personnel and members of the Imbonerakure have been documented since April 2015. Some of the victims are reported to be as young as eight years old. According to the material submitted, women who fled the country in particular were subjected to sexual violence near the border by members of the Imbonerakure and others as a punishment for leaving the country. Rape has dire consequences for the victims not only from a medical but also from a social point of view, as women who have been raped tend to be abandoned by their husbands when the latter learn of the rape.

ENFORCED DISAPPEARANCE

The Chamber noted the multiple instances where members of the opposition, members of the civil society and young men suspected of having participated in demonstrations or of belonging to a rebel movement were removed from the protection of the law and have been abducted, arrested and detained by members of the security forces. Their whereabouts remained unknown for months, and sometimes years, afterwards.

PERSECUTION

The Chamber found, on the basis of the available material, that the crimes of murder and attempted murder, imprisonment or other severe deprivation of physical liberty, torture, rape, and enforced disappearance, constitute persecution. In addition, the Chamber found that the Government and the security forces had also banned demonstrations, harassed journalists and members of opposition parties, and suspended or revoked the licenses of civil society organizations. The Chamber held that these crimes and acts amounted to severe deprivations of fundamental rights, contrary to international law, such as the right to life; the right to be free from arbitrary arrest and detention; the right not to be subjected to torture or to cruel, inhuman or degrading treatment; freedom of expression; freedom of association; and freedom of assembly. The Chamber further held that this persecutory conduct was directed specifically against an identifiable group or collectivity based on political grounds.

These crimes were allegedly committed in Burundi, and in certain instances outside of the country by nationals of Burundi, and started in April 2015. The Chamber indicated that in the light of the continuous nature of certain crimes, the Prosecutor may also extend her investigation to such crimes even if they continue after Burundi's withdrawal became effective. By the same token, under certain circumstances, the Prosecutor may also extend her investigation to crimes that were committed before April 2015.

The authorisation given to the ICC Prosecutor allows her to investigate the abovementioned alleged crimes, and depending on evidence, the investigation might be extended to other crimes against humanity, war crimes or genocide falling within the parameters of the authorized investigation.

7. WHAT ARE THE NEXT STEPS?

The Office of the Prosecutor will collect the necessary evidence from a variety of reliable sources, independently, impartially, and objectively. The investigation can take as long as needed to gather the required evidence. If sufficient evidence would be collected to establish that specific individuals bear criminal responsibility, the Prosecutor would then request the Judges of Pre-Trial Chamber III to issue either summonses to appear or warrants of arrest.