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Burundi and the International Criminal Court October 2017

The first ICC withdrawal?

On 27 October 2017, Burundi will become the first country to withdraw from the Rome Statute (RS) of the International Criminal Court (ICC). The state's imminent withdrawal from the ICC raises questions for the ICC's existing preliminary examination (PE) of the situation in the country since April 2016.

The ICC Office of the Prosecutor's (OTP) PE in Burundi—considered to be at the subject-matter determination phase (*Phase 2*) at the time of the OTP's last PE report (14 November 2016)—has been looking into alleged RS crimes including killings, arbitrary detentions, enforced disappearances, torture, and sexual violence committed in the country since April 2015.

This factsheet reviews the background to the PE and reflects on what Burundi's future as a non-state party might look like.

Burundi, 13 years of ICC membership

The government of Burundi signed the RS on 13 January 1999, and ratified the treaty on 21 September 2004, becoming the 95th state party to the RS. The ICC has been able to exercise jurisdiction over RS crimes committed within the territory of Burundi or by its nationals since 1 December 2004 when the RS entered into force for the country.

During Burundi's almost 13 years as a state party to the RS, the government has [enacted](#) legislation (in 2009) fully incorporating the RS definitions of war crimes, crimes against humanity, and genocide into its penal code. However, the government has not yet implemented crucial RS provisions regarding cooperation with the ICC.

A country in turmoil

From 1993 to 2005, Burundi experienced ethnic clashes between Hutu and Tutsi groups. In 2005, the main rebel group, the National Council for the Defense of Democracy-Forces for the Defense of Democracy (CNDD-FDD), with Hutu support and under the leadership of politician Pierre Nkurunziza, entered government. Following legislative and senate elections administered by the CNDD-FDD that same year, Nkurunziza was elected president.

When Nkurunziza was reelected in 2010, opposition groups denounced the outcome as a [fraud](#), alleging intimidation of voters by soldiers and police. The election effectively became a public referendum on incumbent Nkurunziza following the withdrawal of all opposition candidates, who in



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boycotting the 2010 presidential election claimed earlier local elections had been rigged by the ruling CNDD party.

In late April 2015, President Nkurunziza [announced](#)—with approval from Burundi’s constitutional court—that he would seek reelection for a third term, a move at odds with the country’s two-term presidency limit agreed in the [Arusha Accords](#). The announcement was met with daily protests spanning months, which turned violent—and deadly—as authorities allegedly responded with unlawful force and repression.

Presidential elections subsequently took place on 21 July 2015, despite ongoing demonstrations and violence, with Nkurunziza declared the victor by Burundi’s electoral commission. Violence and other grave human rights abuses reportedly [continued](#) in the aftermath of the elections outcome.

According to [statistics](#) from the Office of the UN High Commissioner for Refugees and the International Organization of Migration, by June 2017 more than 418,000 people had been forced to flee Burundi since 1 April 2015, with a projected 534,000 Burundian refugees by the end of 2017. Meanwhile, a further 209,202 persons were internally displaced in Burundi as of May 2017, including 69,734 individuals linked to the current crisis.

ICC Prosecutor initiates preliminary examination

In November 2015, in a [statement](#) made regarding the worsening security situation in Burundi, Prosecutor Bensouda recalled that “*any person in Burundi who incites or engages in acts of mass violence including by ordering, requesting, encouraging or contributing in any other manner to the commission of crimes falling within the jurisdiction of the [ICC] is liable to prosecution before this Court,*” underlining, among others, the notion of individual accountability for state and non-state actors.

On 25 April 2016, after reviewing RS article 15 communications and reports alleging killings, imprisonment, torture, enforced disappearances, and rape and other forms of sexual violence in Burundi, the OTP [announced](#) its PE into the situation in Burundi since April 2015.

At the time of the PE announcement, more than 430 persons had reportedly been killed, at least 3,400 people arrested, and over 230,000 Burundians forced to seek refuge in neighboring countries.

The 2016 OTP PE [report](#) categorizes the alleged crimes, and specifically killings, under its scrutiny into three periods: a first period encompassing crimes prior to the 21 July 2015 elections; a second period covering the ensuing months until events in Bujumbura on 11 to 12 December 2015; and a third period comprising largely covert and ongoing crimes.

While the PE report notes findings by independent UN experts that the vast majority of violence can be attributed to state actors, it also acknowledges some allegations of violence committed by reported armed members of the political opposition. However, a precise estimate of the number of victims of alleged non-state crimes was not available at the time of the last OTP PE report (14 November 2016).



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UN Independent Investigation in Burundi

In September 2016, the UN Independent Investigation in Burundi (UNIIB) published its final report on what it called a situation of “widespread and systemic patterns of violations” in the country. The UNIIB, [established](#) by the UN [Human Rights Council](#) in December 2015 and led by three independent experts, was tasked with “*an investigation into violations and abuses of human rights with a view to preventing further deterioration of the human rights situation.*”

The UNIIB report concluded that the patterns of violations that took place were “deliberate” and “the result of conscious decisions.” Specifically, the report highlighted executions on a large scale, allegedly carried out by security forces, with the majority of victims opposed to Nkurunziza’s third term; enforced disappearances, also attributed by witnesses to senior government officials; systematic repression of civil society, human rights defenders, and journalists; a pattern of targeted sexual and gender-based violence against fleeing women and girls linked to male dissenters; and the alleged widespread use of torture and ill-treatment, among other violations.

Unconvinced by the accountability mechanisms available within Burundi, and wary of “*the general trend of ethnically divisive rhetoric by the Government, as well as others,*” and the potential threat to peace and security in the wider Great Lakes region, the UNIIB urged the government as well as the African Union, the Human Rights Council, the UN Security Council and other international actors to take robust action.

That same month, the Human Rights Council established the [Commission of Inquiry \(Col\) on Burundi](#), with a mandate of one year, to conduct a thorough investigation into human rights violations and abuses taking place in the country since April 2015. From the outset, the government of Burundi [refused](#) to cooperate with the Col, barring the three Col experts from accessing the country.

Burundi announces its withdrawal from the ICC

In October 2016, six months after the ICC announced the opening of a preliminary examination, and just a few weeks after the UNIIB’s report, the Burundian parliament voted in favor of the country’s withdrawal from the RS.

As set out in provisions of the RS, the government of Burundi notified the UN Secretary-General of this decision by written [note verbale](#) the same month. The withdrawal will come into effect on 27 October 2017 – one year after receipt of the written notice.

Crimes against humanity alleged: Commission of Inquiry findings and future

In its final report, released 4 September 2017, the Col on Burundi stated “*reasonable grounds to believe that **crimes against humanity** have been committed and continue to be committed in Burundi since April 2015.*” The Col asserted that most of these violations were committed by state agents and specifically called upon the ICC to initiate an investigation into the situation in Burundi as a matter of urgency.



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On 29 September 2017, the Human Rights Council adopted a [resolution](#) proposed by the European Union extending the Col's mandate for an additional year. The Council had the previous day adopted a last-minute [resolution](#), put forward by a group of African countries, to send a team of three experts to work in conjunction with the government of Burundi.

Responding to the African resolution before the vote, the EU noted that procedurally it had not faced formal consultation, was only made available in French, and presented little time for meaningful consideration. Substantively, the text was criticized for retaining aspects of the EU proposal but omitting Col investigators' conclusions on the human rights situation in the country, and failing to take into account the government of Burundi's lack of cooperation with the Col. The United States echoed several of the EU's concerns in voting against the resolution.

Impact on the preliminary examination

While the PE will end when Burundi's withdrawal takes effect on 27 October 2017, the ICC would retain jurisdiction should the Prosecutor request (*proprio motu*) and the ICC Pre-Trial Chamber approve, a formal investigation *prior* to that date (RS articles 13c, 15).

Similarly, the Court would retain jurisdiction should a state party to the RS refer the situation in Burundi for investigation *prior* to 27 October (RS articles 13a, 14).

Neither a *proprio motu* nor a state party-referred investigation would be possible after Burundi's withdrawal comes into effect and the preliminary examination in the country closes.

Should a formal investigation be approved prior to 27 October, however, Burundi's withdrawal would not discharge the state from obligations to cooperate with the ICC investigation.

Meanwhile, in the event that no state party referral is made or *proprio motu* application approved by judges prior to 27 October, the ICC could still obtain jurisdiction to formally investigate the situation in Burundi—by that time a non-state party to the RS—by way of a UN Security Council referral (RS article 13b, UN Charter Chapter VII). The OTP currently has investigations underway into situations in non-states parties Libya and Sudan due to the activation of jurisdiction through such UNSC referrals.

There is a strong legal basis for any UNSC referral to also include an obligation for Burundi—as well as other UN member states—to cooperate with the investigation stemming from that referral.

Civil society in the cross-hairs

The Burundi national Coalition for the ICC (BCICC), a civil society network of Burundian non-governmental organizations (NGOs) and practitioners working to promote accountability and justice for international crimes, has long brought attention to allegations of grave crimes in Burundi, including in the conclusions of the ICC PE, UNIIB and Col reports—and has faced hard consequences for it.



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Furthermore, as reflected in [findings](#) of the Committee Against Torture (CAT) in 2016, representatives of BCICC and other members of a civil society coalition bringing allegations of the government's use of arbitrary detention to the attention of the CAT became subject to state reprisals, including disbarment.

On 19 October 2016, the Minister of the Interior, Pascal Barandagiye, had [signed](#) a ministerial order definitively [disbanding](#) five Burundian NGOs, followed on 24 October 2016 by the provisional [suspension](#) of five additional NGOs, including the BCICC. These moves were followed in December 2016 by the adoption by the National Assembly 2016 of two bills requiring local NGOs to obtain authorization from the Minister of the Interior for their activities.

In response, 3 UN Special Rapporteurs [condemned](#) what they deemed a “*pattern of systematically targeting human rights organizations and human rights defenders*” in the country.

Even following such instances of grave repression and prior to corroboration by the CoI findings, Burundian civil society groups [continued](#) to press for an ICC investigation, insisting that with national mechanisms proving themselves incapable, the ICC remains the only mechanism capable of delivering independent and effective justice for RS crimes committed in Burundi since April 2015.

About the ICC and Rome Statute system

Established by international treaty, the RS, the ICC is the only permanent international judicial body capable of trying individuals for genocide, crimes against humanity and war crimes when national courts are unable or unwilling to do so. It is an independent institution¹ and can only prosecute crimes that occurred from 2002 onwards—the date of its establishment.

The Court may only exercise jurisdiction² if:

- The accused is a national of a state party or a state that has accepted the jurisdiction of the Court; or
- The alleged crime took place on the territory of a state party or a non-state party which has made an ad hoc declaration accepting the jurisdiction of the Court; or
- The UN Security Council has referred the situation to the prosecutor, irrespective of the nationality of the accused or whether the state is a party to the Rome Statute.

An investigation may be opened by the ICC prosecutor in three ways:

- A referral of a situation by a state party; or
- A referral by the UN Security Council; or
- Of own accord (*proprio motu*) following a preliminary examination. Authorization by ICC judges required.

Central to the Court's mandate is the principle of complementarity, which holds that it is the primary

² “ICC - ICC at a Glance.” *International Criminal Court*. Accessed March 2015: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx



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responsibility of states themselves to investigate and prosecute those suspected of having committed crimes. The ICC will only act if states are unable or unwilling to investigate and prosecute alleged perpetrators on their own.

Criminal responsibility will be applied equally to all persons without distinction as to whether he or she is a head of state or government, a member of a government or parliament, an elected representative or a government official.

About the Coalition for the ICC

The Coalition for the International Criminal Court is a global network of more than 2500 civil society organizations in over 150 countries working in partnership to strengthen international cooperation with the ICC; ensure that the Court is fair, effective and independent; make justice both visible and universal; and advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity and genocide. www.coalitionfortheicc.org

Where to find more information

- [Coalition for the International Criminal Court website](http://www.coalitionfortheicc.org)
- [International Criminal Court website](http://www.iccnij.org/)
- [Rome Statute of the ICC](http://www.un.org/icee/)