



**Cour
Pénale
Internationale**
**International
Criminal
Court**

Le Bureau du Procureur
The Office of the Prosecutor

Report on Preliminary Examination Activities 2017

4 December 2017

TABLE OF CONTENTS

I. INTRODUCTION	2
II. SITUATIONS UNDER PHASE 2 (SUBJECT-MATTER JURISDICTION).....	7
Gabonese Republic	7
Palestine	12
Ukraine.....	19
III. SITUATIONS UNDER PHASE 3 (ADMISSIBILITY)	28
Colombia.....	28
Guinea	36
Iraq/UK	40
Nigeria.....	46
IV. COMPLETED PRELIMINARY EXAMINATIONS	51
Afghanistan	51
Burundi	62
Registered Vessels of Comoros, Greece and Cambodia.....	68

BURUNDI

Procedural History

282. The situation in the Republic of Burundi (“Burundi”) has been under preliminary examination since 25 April 2016. The Office has received a total of 34 communications pursuant to article 15 in relation to this situation.
283. On 17 August 2017, the Prosecutor notified the President of the Court, in accordance with regulation 45 of the Regulations of the Court, of her intention to submit a request for authorisation of an investigation into the situation in Burundi, pursuant to article 15(3) of the Statute.
284. On 23 August 2017, the Presidency of the Court assigned the situation in Burundi to PTC III.
285. On 5 September 2017, the Office requested authorisation from PTC III to proceed with an investigation into the situation in Burundi from 26 April 2015 onwards, pursuant to article 15(3) of the Statute. This request was made under seal on 5 September 2017 to protect the integrity of the investigation and the life or well-being of victims and potential witnesses in the situation. The Chamber agreed with the Office’s assessment that this exceptional measure, which was fully consistent with the Court’s legal framework, was necessary given the circumstances of this situation.
286. On 25 October 2017, PTC III issued its decision authorising the commencement of an investigation under seal, and ordered the Registry of the ICC to reclassify as public its decision on 9 November 2017.²²
287. On 25 October 2017, following the PTC’s authorisation, the Prosecutor opened an investigation into the situation in Burundi since 26 April 2017 and notified States Parties and those States which would normally exercise jurisdiction over the crimes concerned on 9 November 2017 in accordance with article 18(1) of the Statute.²³

Preliminary Jurisdictional Issues

288. Burundi deposited its instrument of ratification to the Statute on 21 September 2004. The ICC therefore has jurisdiction over Rome Statute crimes committed on

²² [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”](#), ICC-01/17-X-9-US-Exp, 25 October 2017 (ICC-01/17-9-Red), 09 November 2017. The present chapter summarises the public Request for Authorisation, which includes relevant references to sources used.

²³ [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Burundi](#), 9 November 2017.

the territory of Burundi or by its nationals from 1 December 2004 until 26 October 2017.

289. On 27 October 2016, the Government of Burundi lodged a notification of withdrawal with the UN Secretary-General. In accordance with article 127(2), Burundi's withdrawal from the Statute came into effect on 27 October 2017. The Court retains jurisdiction with respect to alleged crimes that occurred on the territory of Burundi during the time period when it was a State Party to the Statute.

Contextual Background

290. Burundi's history, both before and after independence in 1962, has been marked by repeated cycles of violence, including between ethnic communities, namely the majority Hutu and the minority Tutsi communities. Starting in 1993, a violent ethnic conflict that lasted over a decade reportedly cost the lives of more than 300,000 Burundians, and left hundreds of thousands displaced. The civil war, sparked by the assassination of the country's first Hutu President, Melchior Ndadaye, in October 1993, pitted a variety of mostly Hutu rebel movements against Burundi's Tutsi-dominated armed forces, the *Forces Armées Burundaises* ("FAB"). The *Conseil National pour la Défense de la Démocratie-Forces de Défense de la Démocratie* ("CNDD-FDD") was the main Hutu rebel group during this war.
291. In August 2000, the Arusha Peace and Reconciliation Agreement for Burundi ("Arusha peace agreement") set up a power-sharing system between the Hutu and the Tutsi which led to the creation of a transitional government on 1 November 2001.
292. Transformed into a political party, the CNDD-FDD participated in the general elections of 2005, which marked the end of the transition period. It won a majority in the National Assembly in July 2005 and on 19 August 2005, CNDD-FDD leader, Pierre Nkurunziza, was elected President by a Joint Parliamentary Congress comprising members of the National Assembly and the Senate. President Nkurunziza was re-elected for a further term in the 2010 presidential election, which was boycotted by the opposition.
293. The political and security situation in Burundi from April 2015 onwards evolved along three broad phases.
294. In the first phase, the announcement on 25 April 2015 by Burundi's ruling CNDD-FDD party that President Nkurunziza would run for a third term sparked several public protests, claiming that this was barred by the Arusha peace agreement and by the Constitution. By contrast, supporters of the President argued that the first term did not count. On 13 May 2015, while the President was abroad on an official visit to Tanzania, a group of senior military and police officers led by the former head of the intelligence service, the *Service National de Renseignement* ("SNR"), Major General Godefroid Niyombare,

announced a coup d'état on private radio stations and stated that the President had been dismissed. After two days of fighting in the capital, Bujumbura, the coup eventually failed and some senior leaders of the coup attempt were arrested, while others, including Major General Godefroid Niyombare, went into hiding.

295. In the second phase, the presidential election on 21 July 2015, which had been twice postponed, were followed by a number of targeted attacks and search operations by the security forces in neighbourhoods perceived as 'anti-government' or where attacks on the security forces had taken place. Following the election, the Government reportedly further targeted non-state media stations and independent journalists as well as human rights defenders and other members of civil society.
296. In the third phase, attacks by armed men against four military bases in and around Bujumbura on 11 December 2015 led to counter-insurgency operations by the security forces, including house-to-house searches in neighbourhoods associated with the opposition. This reportedly resulted in the killing of a number of civilians, including by summary and extrajudicial executions. These events were allegedly followed by a wave of repression by the security forces, supported by members of the ruling party's youth wing, the *Imbonerakure*, against perceived and actual opponents of the Government. During this third phase of varying levels of intensity, more covert strategies involving abductions, enforced disappearances, and unexplained deaths were also reported.

Subject-Matter Jurisdiction

297. The information available provides a reasonable basis to believe that from 26 April 2015 onwards, members of the Burundian security forces - the *Forces de Défense Nationale* ("FDN"), the police (*Police Nationale du Burundi*, or "PNB") and the intelligence service (*Service National de Renseignement* or "SNR") – and members of the *Imbonerakure* carried out an attack against the civilian population in the province of Bujumbura Mairie in particular. The attack targeted specific categories of civilians based on their actual or perceived political affiliation. This included protesters opposing President Nkurunziza's third presidential term, suspected protesters, members of the political opposition, and persons perceived as opposition members or sympathisers, including journalists, members of civil society organisations as well as residents of neighbourhoods associated with the opposition. The information available furthermore provides a reasonable basis to believe that the attack directed against the civilian population was both widespread and systematic.
298. On the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of an investigation, the Office has determined that there is a reasonable basis to believe that in the context of the situation in Burundi, 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).

299. A number of acts of violence, including murder, are alleged to have been committed by armed anti-government entities and other unidentified perpetrators. However, at this stage, such underlying acts cannot be linked to the contextual elements of crimes within the jurisdiction of the Court. This is because the degree of intensity of the armed confrontation and the level of organisation of armed anti-government entities is insufficient to characterise the situation as a non-international armed conflict. Nor are these underlying acts constitutive of crimes against humanity. These findings are without prejudice to the possible future identification of crimes within the jurisdiction of the Court which may arise from the examination of any new information or evidence.

Admissibility

300. At the article 15 stage, admissibility is assessed in relation to ‘potential cases’ which may be brought.

Complementarity

301. In light of the information available, including information provided by the Government of Burundi, the potential case(s) that would likely arise from an investigation of the situation, related to those who appear most responsible for the most serious crimes, would be admissible pursuant to article 17(1)(a)-(b) of the Statute.
302. The Burundian authorities have established three commissions of inquiry in response to the violent events since April 2015. However, these commissions’ findings have examined only a limited number of incidents and focussed on the criminal responsibility of actual or perceived members of the opposition as ‘insurgents’ for the violence. They have also generally discounted the alleged responsibility of members of the Government, the security forces or the *Imbonerakure* for the commission of crimes. The limited number of cases that the authorities have initiated into the death or abduction of civilians appears to have focussed on isolated acts and generally lack specificity. As such, the Office has been unable to identify at this stage the actual contours of the relevant person(s) or conduct under investigation.
303. More specifically, none of the domestic proceedings examined by the Office reveal any past or ongoing criminal process that seeks to establish the criminal responsibility of members of the Burundian authorities, the security forces

and/or the *Imbonerakure* who appear to bear the greatest responsibility for the alleged crimes. No leaders of the units allegedly involved in the commission of crimes, nor other relevant members of the political, defence and security leadership have been investigated or prosecuted for the crimes alleged.

304. As such, the information available indicates inactivity by the Burundian authorities in relation to the crimes identified. Additionally, to the extent that the Burundian authorities have cleared members of the security forces as alleged physical perpetrators of any wrongdoing, the Office believes that the inquiries conducted into these allegations were not conducted genuinely, but were undertaken for the purpose of shielding the persons concerned from criminal responsibility.

Gravity

305. The crimes were allegedly committed on a large scale, with an estimated 593 killings, 651 cases of torture, 3,477 arbitrary arrests or detentions, and 36 enforced disappearances, and widespread rape and sexual violence. Moreover, the information indicates that the alleged conduct was committed with discriminatory intent, based on actual or perceived political affiliation of the victim(s), and, in the case of torture, rape and sexual violence, with particular cruelty.
306. The alleged crimes committed have had a particularly severe impact on children and victims of SGBC. Victims of rape in particular experienced long-lasting physical and psychological consequences. The crimes identified had a severe impact not only on direct victims - who lost their lives, suffered severe physical and psychological injuries - but also on indirect victims. According to the Office of the UN High Commissioner for Refugees ("UNHCR"), 413,490 people had sought refuge in neighbouring countries between April 2015 and 31 May 2017. This had a severe impact in particular on child refugees, who constitute a significant part of the total refugee population. The situation has also had a negative impact on the socio-economic and humanitarian needs within Burundi, with a dramatic increase in the number of people needing humanitarian assistance from 1.1 million to at least 3 million in 2016 (26 percent of the total population of Burundi).

OTP Activities

307. During the reporting period, the Office focussed its activities on consolidating its analysis and drafting the Request for authorisation to proceed with an investigation into the situation in Burundi.
308. On 4 November 2016, the Prosecutor gave an interview to *Infos Grands Lacs*, providing an update on the status of the preliminary examination to the public and explaining the Office's position on the Burundian withdrawal.

309. On 5 December 2016, in a letter to the Burundian Ambassador to the Netherlands, the Prosecutor presented the Office's position on the withdrawal and requested the Burundian authorities' assistance to enable a mission of the Office to Burundi.
310. On 18 April 2017, the Office sent a request for information to the Burundian Government for additional information on relevant proceedings in relation to the crimes allegedly committed in Burundi. In response, on 1 June, the Government of Burundi provided information and documents which were duly taken into consideration.
311. To examine the seriousness of the information received and discuss matters relevant for the assessment of admissibility and the interests of justice, the Office further engaged with competent stakeholders, including article 15 communication senders, victims' representatives and members of international human rights organisations.

Conclusion and Next Steps

312. The preliminary examination of the situation in Burundi is now completed. For the reasons set out above and on the basis of the information presented and the supporting material, on 25 August 2017, the PTC authorised the commencement of an investigation into the situation in the Republic of Burundi since April 2015. In accordance with the Chamber's decision, the time period of the investigations will focus on crimes allegedly committed from 26 April 2015 to 26 October 2017, but may also extend to related or continuous crimes that occur outside of those parameters.
313. PTC III has further confirmed that Burundi's withdrawal from the Statute has no effect on the jurisdiction of the Court over crimes allegedly committed during the time period it was a State Party. Nor does it affect the continuing obligation of Burundi to cooperate with the Court in relation to the investigation, given that it was authorised and initiated before the withdrawal of Burundi from the Statute came into effect.